

REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR ;
AND DECIDED
DURING THE SESSION
1820*.

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BARRISTER AT LAW.

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1825.

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REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS;

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session, 1820.

1 GEO. IV.

ENGLAND.

WRIT OF ERROR FROM THE COURT OF KING'S BENCH.

BETWEEN

RICHARD JESSON, JOSEPH HATELY, WILLIAM WHITEHOUSE, JOSEPH WALTON, EDWARD DANGER- FIELD, the elder, and THOMAS DANGERFIELD,	}	<i>Plaintiffs in Error.</i>
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AND

JOHN DOE on the several Demises of EZEKIEL WRIGHT, JOHN WRIGHT, THOMAS WRIGHT, GEO. WRIGHT, ISAAC WRIGHT, WILLIAM WRIGHT, the younger, LUCY WRIGHT, MARY WRIGHT, DANIEL WRIGHT, ELIZABETH MOSLEY, and THOMAS STOKES,	}	<i>Defendants in Error.</i>
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1890.

JESSON AND
OTHERS v.
WRIGHT AND
OTHERS.

DEVISE.—To W. (a natural son of the testator's sister) for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, &c. shall appoint; and for want of such appointment to the heirs of the body of W. share and share alike as *tenants in common*; and if but *one child* the whole to such only child, and for want of *such* issue to the heirs of devisor. Held—that an *estate tail* vested in William by this devise.

The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is clear that the testator meant otherwise.

Semble—that under such power an appointment to an only child, before others born, is effectual.

Whether a power, under which all children have an interest, can be destroyed by forfeiture. *Quære*.

Doe v. Goff, 11 East, 668, held not to be law.

THIS was an ejectment brought in the Court of King's Bench against the Plaintiff in Error, to recover the possession of tenements in the county of Stafford.

This cause came on to be tried at the assizes for the county of Stafford, holden at Stafford, on the 16th day of March, 1815, before the Honourable Mr. Justice Dallas, when the jury, by the consent of the parties, found a special verdict.

The special Verdict states,

Ezekiel Perse-
house seized.
24th April,
1773.

That one Ezekiel Persehouse, being seized in fee of the premises set forth in the declaration, made and published his last will in writing, on the 24th of April, 1773, executed and attested as the law requires, for passing real estates by devise, and that thereby, among other things, he gave and devised

the premises in the declaration mentioned, with the appurtenances, in the words following :

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OTHERS.
Devises.

“ I give and devise unto William, one of the
“ sons of my sister Ann Wright, before marriage, all that messuage, tenement, or dwelling-house, malt-house, stable, buildings, garden, hereditaments, and premises, with their and every of their appurtenances, situate and being in the parish of Tipton, otherwise Tibbington, and county of Stafford, now in my own possession : and all those two dwelling-houses, barn, shops, buildings, gardens, hereditaments, and premises, situate in the said parish of Tipton, otherwise Tibbington, now in the occupation of John Law, and Timmins : and also all those seven closes, pieces or parcels of land, or ground, to the said two dwelling-houses and buildings adjoining, or nearly adjoining, and belonging, with their and every of their appurtenances, now in my own possession : to hold the same premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair : and from and after his decease, I give and devise all the said dwelling-houses or tenements, buildings, garden, lands, hereditaments, and premises, with their and every of their appurtenances, unto the *heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, in such *shares and proportions* as he the said William, in and by any deed or writing, deeds or writings, or in and by his last

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OTHERS.

“ will and testament, in writing, to be by him
 “ duly executed, in the presence of three or more
 “ credible witnesses, shall give, direct, limit, or
 “ appoint the same; and for want of such gift,
 “ direction, limitation, or appointment, then to
 “ the *heirs of the body* of the said William, son of
 “ my said sister Ann Wright, lawfully issuing,
 “ *share and share alike, as tenants in common*, and
 “ if but *one child*, the whole to *such only child*.
 “ And for want of such issue, I give and devise
 “ all the said dwelling-houses, buildings, lands,
 “ hereditaments, and premises, to my right heirs
 “ for ever, charged and chargeable, nevertheless,
 “ with and for the payment of one annuity or
 “ yearly sum of 20*l.*, of lawful money of Great
 “ Britain, half yearly, to my said sister, Ann
 “ Wright, and her assigns, for and during the
 “ term of her natural life; the first half-yearly
 “ payments thereof to begin and be made by the
 “ said William, son of my said sister, Ann Wright,
 “ at the end of six months next after my decease,
 “ or by such other person or persons, who, ac-
 “ cording to the true intent of this my will, may
 “ be seized of the said dwelling-houses, buildings,
 “ lands, hereditaments, and premises; and when
 “ and so often as the said annuity, or any part
 “ thereof, shall be behind and unpaid by the space
 “ of twenty days, next after the same ought to be
 “ paid, as aforesaid, that then, and at any time
 “ then after, it shall and may be lawful to and for
 “ my said sister, Ann Wright, or her assigns, into
 “ and upon the said dwelling-houses, buildings,
 “ lands, hereditaments, and premises, or any of

“ them, or any part thereof, to enter and distrain ; 1890.
 “ and such distress and distresses to sell and dis-
 “ pose of to satisfy and discharge all such arrear- JEKSON AND
 “ ages, with the costs and charges of taking, keep- OTHERS v.
 “ ing, and disposing of the same.” WRIGHT AND
OTHERS.

The special verdict then states, that the said Ezekiel Persehouse died on the same day, seized of the said premises, without altering his will ; and that, upon the death of the said Ezekiel Persehouse, Thomas Stokes, Ann Wright, and Elizabeth Persehouse, were his co-heirs, of whom Ann Wright and Elizabeth dying, respectively, Daniel Wright and Elizabeth Mosley succeeded, as heirs, which said Thomas Stokes, Daniel Wright, and Elizabeth Mosley, are three of the lessors of the Plaintiff.

The special verdict further states, that immediately after the death of the said Ezekiel Persehouse, the said William Wright named in his will, entered in the said premises, and became seized of such estates as legally passed to him under the will of the said Ezekiel Persehouse ; and that, afterwards, on the 13th December, 1774, he married one Mary Jones, by whom he had issue, Edward Wright, Elizabeth Wright, Lucy Wright, Ezekiel Wright, John Wright, Thomas Wright, George Wright, Isaac Wright, Mary Wright, and William Wright, the younger, born in the above order, of whom Elizabeth, afterwards, on the 23d February, 1798, died without issue ; and Lucy, Ezekiel, John, Thomas, George, Isaac, Mary, and William, the younger, are the other lessors of the Plaintiff.

The special verdict further states, that *after-*

Ezekiel Persehouse dies
 seized on the
 same day.

Tho. Stokes,
 Ann Wright,
 and Elizabeth
 Persehouse,
 his co-heirs.
 Ann Wright
 and Elizabeth
 Persehouse
 dying, Daniel
 Wright and
 Elizabeth
 Mosley suc-
 ceeded as
 heirs.
 Said William
 Wright en-
 tered.

13th Decem-
 ber, 1774,
 marries.

And has issue,
 Edw. Wright,
 Eliz. Wright,
 Lucy Wright,
 Ezek. Wright,
 John Wright,
 Tho. Wright,
 Geo. Wright,
 Isaac Wright,
 Mary Wright,
 and William
 Wright, the
 younger.

23d February,
 1798, death of
 Eliz. Wright.

1820.

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OTHERS V.
WRIGHT AND
OTHERS.16th and 17th
January, 1800.Indentures be-
tween William
Wright, and
Mary, his
wife, and Ed-
ward Wright,
their eldest
son, to Ro-
bert Long,
for suffering a
common re-
covery.Hilary Term
following. Re-
covery suffered
accordingly.Wherein Wil-
liam Wright,
and Mary, his
wife, and Ed-
ward Wright,
were vouches.Entry of the
lessors of the
Plaintiff.Ejectment and
ouster.Easter Term,
1816. Special
verdict ar-
gued.Judgment for
Plaintiff be-
low.

wards, by certain indentures of lease and release, executed, respectively, on the 16th and 17th January, 1800, the said premises were conveyed by the said William Wright, and Mary, his wife, and the said Edward Wright, *their eldest son*, to Robert Long, as tenants, to the precipe, to the intent that a common recovery might be suffered, for the purpose of barring and extinguishing all estates tail, and all remainders and reversions, of and in the said premises; and, that a recovery accordingly was afterwards suffered as of the Hilary Term following, wherein the said William Wright, and Mary, his wife, and Edward Wright, were vouched to warranty, and entered into the warranty, and defended their right in the usual way; whereupon a writ of seizin afterwards issued and was executed.

The special verdict then states the entries of the several and respective lessors of the Plaintiff, on the premises, and their seizin, according to law; and the several demises to John Doc, the Plaintiff in Ejectment, who entered and was possessed, until the Plaintiffs in Error entered on the premises and ejected him thereout.

This special verdict was argued in Court in Easter Term, 1816, the Plaintiff below arguing that William Wright, the devisee, took an estate for life only, with remainders to his children for life, respectively, as tenants in common, while the Defendants below contended that the said William Wright took an estate tail. The Court gave judgment for the Plaintiff below.*

Against this judgment a writ of error was brought. The principal error assigned was, that the Court below, by their judgment, had decided, that "William Wright took only a life-estate under the will of, &c., with remainder to his children for life; and that the recovery suffered by William Wright, Mary, his wife, and Edward Wright, was a forfeiture of their estate. Whereas the Plaintiffs in Error contended, that the testator intended to embrace all the issue of William Wright, which intention could only be effected by giving William Wright an estate tail, for which purpose the words of the will are fully sufficient."

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OTHERS.
Writ of error
and errors assigned.

For the Plaintiffs in Error—*Mr. Jervis* and *Mr. Sugden*.

It was the intention of the testator to include all William's issue, and sufficient appears on the face of the will to enable a court of law to effectuate his intention. The decision in the Court below attributes this meaning to the testator,—That if William had only one child born who survived him, such child should take the whole estate *for life*; but if he had twelve (for example), and eleven died in his lifetime, the surviving child should have only a twelfth of the estate for his life. Is this a probable intention?—Again, if he had twelve children, and they all died in his lifetime leaving issue, according to this decision none of the issue could take? If their parents, indeed, had lived, they might have been supported out of the estate, but if their parents chanced to die in William's lifetime, they could derive no benefit from

Argument for
Plaintiff in
Error.
7th, 9th, 12th,
and 14th of
June.

1820.

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OTHERS.

the estate. William was an illegitimate child, and yet the testator thought fit to provide for him and all his unborn children. If we consider the probable duration of their lives, it is not likely that the testator intended to stop there, with all the risks attending such a limited bounty, and then to give the estate to his heir at law. What is the value of such a gift? To the devisees it is highly important, that the estate should not go over until a total failure of all their issue, but to the heir the value of a reversion in fee after a life estate to a young person with remainders for life to all his children is trifling. Suppose that twelve children had survived William, is it a probable intention, that upon the death of each a share should fall to the heir, who would thus perhaps be a long series of years acquiring all the shares in the property.

The testator has given the estate to the heirs "of the body of William lawfully issuing." Those words clearly include all the posterity of William. But it is said that he has *translated* his words to mean children. There is no doubt but that he intended the children to take. But the translation is too narrow. It makes the testator say that William's children shall take only for life, and that none of their children shall take after them. What warrant is there for this in the will? Can it be argued, that because under the latter words in the will, *had they stood alone*, William's children would merely have taken estates for life, therefore, they shall in this case take only that quantity of interest, although the testator has *expressly* given the property to

the heirs of William's body, which would include all his possible heirs? The testator intended William to take for life, and he intended all his issue to take. But he intended his children to take as purchasers; and it is manifest that he considered, (although erroneously in point of law,) that his intention to include all William's possible issue would be effectuated if the children did take as purchasers. The argument assumes this shape, that because he intended the children to take as purchasers, and has not repeated words of inheritance, they can only take for life as tenants in common.

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OTHERS.

It seems impossible to contend, that William under this power might not have appointed *an estate of inheritance** to a grandson, or more remote issue, born in his lifetime, and this of itself decides the case. This, it is argued, the rule of perpetuity forbids. It may be admitted, that he could not appoint to a child, with remainder to the issue of that child, to take as a purchaser; but where, as in this case, the power is to appoint to heirs of the body a class of unborn persons as

* The power is to appoint to heirs of the body of William in such share and proportions as William shall appoint, not in such manner and form, (as well as in such shares and proportions,) according to the power in the King v. the Marquis of Stafford, 7 East, 521; nor for such estates according to the power of devise given in Leonard Lovie's case: nor is it a power to dispose of the estate, as the donee should think fit, as in Liefie v. Saltingtone. It may be said, that an appointment to a living grandson of William, and the heirs of the body of the grandson, would be an appointment to the heirs of the body of William. In this sense of the argument, "*estate of inheritance*" means estate tail. On this point see farther, p. 23, and note.

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OTHERS.

purchasers, it may be exercised by appointing, in the first instance, to a grandchild as a purchaser. The rule of perpetuity forbids only a possibility upon a possibility—as an appointment to an unborn son, with remainder to an unborn son of the son. Appointments to grandchildren as purchasers, under powers in marriage settlements, are of every day's practice. It is immaterial that in this view of the testator the children, &c. must take by purchase—that must be of necessity: they could not take under the power from William.* It is indeed said, that as issue taking under a power must take by purchase, this shows the words were used in that sense. If this were conceded, it would remain to be shown, that *used as words of purchase*, they were not intended to include more than the first line of generation, and merely to give to them life estates as tenants in common.

Let us consider this proposition. A devise to A. and the heirs of his body; of course he takes an estate in tail. A similar devise with a power to A. to appoint to any of the heirs of the body. Is it possible to contend that this right to defeat the estate so given to him, and to make those take by purchase, who, *if the power remained unexercised*, would take by descent, can

* At this part of the argument, the Lord Chancellor observed, as to the distribution under the power, that, although the words heirs of the body, in a legal construction, could apply to one person only, it might be contended, where a power was given to appoint to heirs of the body, that it meant a class of persons. The ulterior limitation to one child, in default of appointment, might operate as a description of the person, and would not conclusively prove that no estate tail was intended to be given.

vary the construction of the devise to A. in tail? The supposed case is not different in principle from the present. In the one the estate tail is given in the first instance, but defeasible by exercise of the power; in the other the limitation in tail follows the power. It is immaterial whether it precedes or follows. In the former case the children would take by purchase when the power should be executed in their favour. If the power remained unexercised, the heirs of the body would take by descent. So in this case—where the first limitation is to William for life, with remainder to the heirs of the body of William, according to his appointment, remainder, in default of appointment, to the heirs of his body, &c. If the power is exercised, the heirs being appointees take by purchase; if no appointment is made, the estate descends to the heir to whom it is limited. The words, notwithstanding the power, may operate as words of limitation.

This case was decided in the Court below, upon its own merits, without reference to authorities; but the decided cases are strong authorities against the judgment. In the case of *Seale v. Barter*,* which was a devise of all the testator's lands to his son, John, and his children lawfully to be begotten, with power to settle the same, or any part thereof, by will or otherwise, to them or any of them as he should think proper; and for default of such issue, over—it was held that John took an estate tail, and that this construction

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* 2 Bos. and Pull. 485.

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was not weakened by the power. The power, it was said by *Lord Alvanley*, in delivering the judgment of the Court, had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. But the power, because it *enabled* John to make his children take by purchase, did not make it imperative on the Court to give the estate to the children by purchase in all events, and to confine them to life estates as tenants in common. So in the case of *Doc, d. Cole v. Goldsmith*,* which is reported by *Taunton*, vol. vii. p. 209. but more strongly to the point in question in 2 *Marshall*, 517. upon a devise to F. G. and his assigns for life, and from and immediately after his decease to the heirs of his body in such shares, &c. manner and form as he should appoint, and in default of *such* heirs of his body, *then from and immediately after his decease* to J. G. it was held by the Court, as matter beyond doubt, that the testator intended that all the heirs of F. G. in a line of succession, should be extinguished before J. G. should take by the limitation over, and, therefore, that an estate tail by implication must be held to arise to F. G. because there was no other way to perpetuate the succession in the manner intended. There was no distinct limitation, as in this case, to the heirs of the body of the tenant for life in default of appointment. That expression occurred only in the clause giving the power, and the words introducing the de-

vise over, and the referential word *such* is to be found in that case as in this. In *Doe v. Goldsmith*, the intent to give an estate tail was implied from the words preceding the limitation over. Here is a distinct gift in words having a fixed legal operation.

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The Lord Chancellor. The gift is to the heirs of the body share and share alike as tenants in common.

Mr. Sugden. If it can be made consistent with other words in the will, to give the children estates for life only,—then they must take by way of purchase, as tenants in common. But the words, share and share alike, may be construed by reference to the power which contains an implied or possible gift, under which they would take as tenants in common.

Lord Chancellor. If I had lived 200 years ago, I should have had no doubt that such limitations, as we see in this will, would have given an estate tail. But your argument supposes, that the donee of the power might appoint among grandchildren, &c. to the remotest posterity. That I should have thought impossible, if I had lived 200 years ago.

Mr. Sugden. Keeping within the rule of perpetuity, he might have appointed to any the remotest heir of the body.

It may be admitted, that if “heirs of the body” means children,—such heirs, or such issue, must mean the same thing. The same words cannot have different meanings, in the different parts of a will. But the supposed virtue of the word *such*,

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did not avail in *Doe v. Goldsmith*, where it must have been held an executory devise;—whereas, in this case, it is clearly a contingent remainder.

The inconvenience of the supposed intention has been already noticed. If only one child should be born, they imagine the testator meant that he should take the lands for life. If twelve children, and eleven died infants, according to one construction, the survivor would take the whole;—according to another construction, he would take only a twelfth part. If the eleven died, leaving families, the families would take nothing. It was argued in the Court below, that under the will, cross remainders for life were to be implied, as among the children of William. But this argument was adverse to the interest of the heir at law, by whose counsel it was urged. It may be necessary to ascertain on which of the counts in the declaration they have entered up the verdict.—Some are on the demise of the children, some on that of the heirs at law. The judgment itself does not furnish the information.

Mr. Taunton. Lord Ellenborough said, that as there were counts on the demise of the heir at law, as well as the children, it was unnecessary to enter into the argument, as to the cross remainders, which might be material, as between the two sets of Plaintiffs; but was immaterial, as between them and the Defendants.

Lord Redesdale. Is Edward Wright living?

Mr. Sugden. Edward the son is living as well as the father. They put it as a forfeiture of the life estate.

Lord Redesdale. If it is a forfeiture by Edward the son, it must be because he took under the appointment; and so it must be argued as a forfeiture of the whole.

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Lord Chancellor. Were other children living at the time?

Mr. Sugden. That appears only by inference to be drawn from the special verdict. The word "afterwards" in that part of the verdict which states the conveyance, does not conclusively mean in point of time, after all the facts before stated in it.

Lord Redesdale. Could the power be destroyed by forfeiture where all the children have an interest?

Mr. Sugden. Such a question is now depending before the Vice-Chancellor,* and probably will go farther.

Lord Redesdale. How could it be destroyed by such instruments as these? It must be by some instrument expressly renouncing it. How can a man, having a power for the benefit of children, destroy it?

Lord Chancellor. The appointment ought to be stated. It appears by the verdict, that Edward

* *Smith v. Death*, before the Vice-Chancellor, who delivered his judgment on the 19th of June, 1820. The decision was that the power could be destroyed. The same question was argued, but not decided, in *West v. Berney*, before the Vice-Chancellor in Hilary Term, 1819.—See *Sugden on Powers*, pp. 80, 81, third edition.

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was the son of William. How does it appear that the appointment did not take effect in his favour before any other child was born?

Mr. Taunton. In the special verdict there is no appearance of appointment.

Lord Chancellor. We sit here to decide on cases as they appear on the record.*

Mr. Taunton. On the trial, the appointment could not be proved; and it was agreed that it should be put out of consideration. The recital of a fact in a deed is no evidence against strangers. *A fortiori*, the mere description, cannot be evidence against the Plaintiffs in the action.

Lord Redesdale. Would not this instrument (in the absence of any other) operate as an appointment?

Mr. Taunton. It was executed *alio intuitu*, merely to make a tenant to the præcipe.

Lord Chancellor. The making Edward a party to the deed, is evidence that they did not choose to deal with William, as having an estate tail; and therefore took in Edward as having such estate. The question is, whether William so acting towards Edward, the deed of William must not operate as an appointment.

* No appointment is stated in the special verdict; but, in the printed case of the Plaintiff in Error, William is described as *appointee in tail general*. Upon this point see the observations of the Lord Chancellor in giving judgment, pp. 51, 52. This part of the argument is preserved on account of the judicial observations.

Mr. Sugden. A recital has in Chancery been held to be an appointment.* A covenant to levy a fine has been held not to operate as a destruction of the power,† because the court looks to intention. So even where a fine has been levied.‡ A deed of covenant cannot so operate, because it imports an intention that something more should be done. And where a deed, declaring the uses (after the fine levied), was executed, in the manner required by the power, it was held, that the deed and fine taken together, operated as an appointment.‡ Admitting that the description alone does not make the son appointee, yet it may operate to show an intention of appointment, and being followed by the declaration of uses in the deed of recovery, they altogether operate as an execution, and not as a destruction of the power. This is a stronger case than that of Lord Leicester, and others of that class. There the ground was intention, to be inferred from the nature of the transaction. But here is an express declaration, operating as an appointment to the son. There is nothing on the face of the verdict to show that any other child was living at the date of the appointment. The subsequent birth of issue, in such circumstances, could never defeat the estate of the son. The difficulty which occurs in other cases, where there

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* *Wilson v. Pigott*, 2 Ves. J. 351.

† *The Earl of Leicester's Case*, 1 Ventr. 278. It is also reported under the name of *Wigson v. Garrett*, or *Garrad*, 2 Lev. 149. Raym. 239. 3 Keb. 366. 489. 510. 536. 572.

‡ *Herring v. Brown*, 2 Shower, 185. 1 Ventr. 368. 371. *Skinner*, 35. 53. 71. 184. Carth. 22. Comb. 11.

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are not contingent remainders, does not arise in this case.

The argument that the children took mere life estates, is sufficient to destroy the Respondents' case. There is no authority extant, in which the words, "heirs of the body," in such a case as this, have been cut down to life estates. The children have always been held to take the inheritance.

The authorities cited in support of the adverse claim are not applicable to this case. In *Goodtitle v. Herring*,* the limitation to the "heirs male, of the body," was in a subsequent part of the will clearly explained, nay, even expressed to mean *sons*. In this case we have no such expression or explanation. In *Archer's case*,† the limitation was to the *next heir*, in the singular number, and words of limitation were superadded, viz. *to the heirs of the body* of that *next heir*. In *Cheek v. Day*,‡ the devise was to the heir in the singular number, and words of inheritance in fee were grafted upon that limitation. In *Walker v. Snow*,§ the same circumstances occurred, and it was, moreover, clearly a description of the person. *Lisle v. Gray* || was nearly similar to *Goodtitle v. Herring*,** where the words heirs male of the body, were explained by the will, to mean sons successively. So in *Lowe v. Davies*,†† occurred the

* 1 East, 264.

† Rep. 66.

‡ Moor. 593. 2 Roll. Abr. 417. (G.) pl. 7. Cro. Eliz. 313. Ow. 148. (cited Ld. Raym. 295. and Fitz. Gib. 24). See also *White v. Collins*, Com. Rep. 289.

§ Palm. 359.

|| 2 Lev. 223. Raym. 278.

•• 1 East. 264.

†† 2 Ld. Raym. 1561.

same explanation by subsequent words, of the limitation to the *heirs lawfully to be begotten*. In *Doe v. Laming*,* not only were there superadded words of limitation in fee grafted on the limitation, to the *heirs of the body*; but, moreover, the devise was to heirs of the body, as well *males as females*; and being of lands in Gavelkind, those words could not operate by way of limitation, but must of necessity, in order to effectuate the intent of the testator, operate by way of purchase. For the limitation, as it stood expressed, included issue who could not take by descent.

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In this case the testator by the word *such*, might mean to refer to children; children might have been the *issue* contemplated. But he had before expressed, and it must be presumed he intended an entail that all the issue of William might inherit. Here, therefore, are incompatible intentions, and* the general must prevail against the particular intent. So in the case of *Coulson v. Coulson*,† it was argued, from the interposition of trustees, to preserve contingent remainders, that the testator contemplated, and intended to raise contingent remainders to be preserved, and probably it was so. But the general rule prevailed in that case, notwithstanding such probable particular intent to be inferred from that provision and limitation.

William being an illegitimate son, he and his children were strangers to the testator. This has in all

* 2 Burr. 1100. 1 Black. Rep. 265. Et vid Durnf. and East. Rep. a note on this case.

† 2 Stra. 1125. 2 Atk. 246, et vid Hodgson et ux v. Ambrose. Dougl. Rep.

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such cases furnished an argument upon the gift, over in default of issue. The words operate as a gift, to the heir at law. But when vested, he is in at law by descent. The question is, whether the testator ever intended it should go to his heir at law, whether by descent or by devise, until all the issue of the illegitimate son were extinct.

As to the words "among the heirs of the body, "share and share alike, as tenants in common, " &c." they have in many cases been rejected, where it has appeared that the testator intended to give to the whole line of the issue. It is necessary in such cases, to hold it to be an estate tail, to guard against the inference from the want of any express limitation or implication of cross remainders among the children, so as to give the estate of a child dying without issue, to the survivors. The cases show that it ought not to be implied that the father takes for life only, unless the court can raise such further implication, as to give the whole estate to all the children. In *Doe v. Smith*,* the devise was to M. A. and the heirs of her body, as *tenants in common*, which was held to give an estate tail, notwithstanding those latter words, and the reasoning of Lord Kenyon in delivering judgment in that case, is applicable to, and decisive of this case. Again, in *Doe v. Cooper*,† the devise was expressly to R. C. for life only; and after, &c. to the issue of R. C. as tenants in common; and in case R. C. should die without leaving lawful issue to E. H. and her heirs. The court held

* 7 T. R. 531.

† 1 East. 229.

that, an estate tail by *implication* vested in R. C., because cross remainders among the children could not be implied; and although it was admitted by the judges, that it appeared to be the particular intent of the devisor that R. C. should take only an estate for life; yet that intent, being inconsistent with the general and paramount intent, that all his issue should inherit the entire estate before it went over, was disregarded. The words of the will in that case were, on the one hand, much stronger for a tenancy for life; on the other, much weaker for a tenancy in tail, than the words of this will. In *Frank v. Stoven*,* which was a devise to B. F. for *life, without impeachment of waste*, and with *power to jointure*; and after, &c. to the *issue male of his body and their heirs*; and *in default of such issue*, to R. F., &c. It was held an estate tail in B. F., although the issue or children, apparently were made the stock of a new line of heirs, and the first estate was given expressly for life, with powers not wanted by a tenant in tail. In that case also, the particular intent was disregarded; and the recovery was upheld, by which the children were disappointed. So in *Franklin v. Lay*,† lately decided, although superadded words of inheritance occurred in that case also, the same principles of decision were upheld. In *Mogg v. Mogg*,‡ where the first devise was to children for life, and the remainder to the *issue* of the children

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* 3 East. 548.

† Before the Vice-Chancellor, 3rd May, 1820, not reported.—
See the note at the end of the report of this case.

‡ 1 Meriv. 654. Some of the children were unborn.

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and their heirs, as *tenants in common*; and in default of *such issue* over,—it was held on the doctrine of Cy-pres, where the limitations would otherwise have been void as a perpetuity, a devise to the children, as tenants in common in tail, with cross remainders. In *Mogg v. Mogg*, the limitation was void, as against the policy of the law, and the Court might on that account have refused to interfere. Here is no such impediment, and the children cannot otherwise than by giving an estate tail to the parent, take such interest as the testator intended. If, according to the argument, the children would take estates only for life, the necessary consequence is, that the parent must take an estate tail; otherwise the intention of the testator is frustrated. He intended to provide for the issue, and they would have no provision.

If the gift had been to “*children*,” instead of “*heirs of the body*,” the same argument would have arisen. The word *children*, when used as a *class*, gives the same interest. That appears by the authority of the Court of K. B. in *Doc v. Webber*,* a case in which there was a devise to M. H. and her heirs; and in case M. H. should die and leave no child or children to J. B., &c. The Court held that child or children meant issue, not confined to immediate, but extending to the remotest descendants. Such was the opinion of that Court upon a question, whether it was an estate tail, or an executory devise; whether the words child or children, in the contingent clause, introducing the remainder over, reduced the fee before

* 1 B. and A. 713.

given to an estate tail. Upon which point, nothing is to be collected in that case, except from the words introducing the devise over itself. But in this case, it is an express devise in tail; and the intention clearly appears not to give any estate to the heir at law, until the remotest issue of W. are extinct.

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As to the intention, the Respondents have argued nothing. They rely on the rigid legal construction of the words. They contend, 1. that under the power, the heirs of the body must take as purchasers; and if so, as children. 2. That in default of appointment, they take as tenants in common; again, as they argue, as children. Lastly, they say, the limitation introducing the remainder over, viz. in default of *such* issue, directly refers to "*child*," the last antecedent; and therefore issue in that place means children as before. To the first argument, the answer is, that the donee might have appointed to any of the heirs of the body, considering them as a class. Which of the words come first, and which last, is immaterial. The power is to appoint to heirs as purchasers, and not as descendants. Such a power cannot break the estate tail; it would not do so if the devise were to children. Taking the word to be "*children*," according to their construction, he might appoint to any of his descendants. *Liefe v. Saltingstone*.* Under the power in this case, William might have

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* 1 Mod. 189. In that case the devise was to the wife for life; and "by her to be *disposed of* to such of my children, &c.;" and the judges being a majority who decided ~~the case~~ ^{in this} case, relied on the word "*dispose*," as implying such a power as the testator himself had, which was to ~~dispose~~ ^{dispose of} of the fee.—See the next page.

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given the estate in fee * to a person filling the character of heir of the body. It is said that there are no words empowering such appointment. But the authority last cited proves that words of inheritance are not necessary, even if the devise had been to "*such children*," &c. In *Doe v. Goldsmith*,† the devise was to F. G. for life, and after, &c. to the *heirs of his body*, &c. as F. H. should appoint; and in default of *such heirs of his body*, then immediately after his decease to J. G. In that case *heirs of the body* must mean children, if they do so in ~~this~~; and so it was argued. Yet the court held it to be an estate tail by implication. Such a power was never adjudged to defeat an estate tail. ‡

As to *Doe v. Goff*, where the devise was to M. and the heirs of her body, as tenants in common, and not as joint tenants; but if such issue should die before he, she, or they respectively attain the age of twenty-one, then to J. M. and his heirs, it was held an estate in the children, in common in tail, chiefly upon the effect of the

* Upon the general question, whether a fee simple may be given under a power to appoint among the heirs of the body, issue, children, &c. without any additional words to extend the power. See Sugden on Powers, 9. c. s. 10. In the *King v. Marquis of Stafford*, the Court said they would not determine the general question, but relied on the efficacy of the words *manner and form*. The power in *Phelps v. Hay* had the same words. Sugden on Powers. Appendix, No. 18.—See ante, p. 9.

† 7 Tau. Rep. 209, and 2 Marsh. Rep. 517. Mr. Sugden added, *arguendo*, that the case was free from prejudice, because *Doe v. Jesson* was not cited or noticed. V. Post. 44.

‡ That remainders in default of appointment are not suspended or kept in contingency by powers annexed to, or which accompany preceding estates. See *Cunningham v. Moody*, 1 Ves. 174. *Doe v. Martin*, 4 T. R. 39.; and the same doctrine as to personal property, 1 Ves. 210. 2 Ves. 208. Amb. 365.

words preceding the limitation over. As to *Gretton v. Haward*,* the devise was to A. H. she first paying all my just debts, &c.; and after her decease, to the *heirs of her body, share and share alike, if more than one; and in default of issue, to be lawfully begotten by me, to be at her own disposal.* The case was decided on the peculiar language of the will importing that the gift was not after an indefinite failure of issue. *Doe v. Covey*,† which is not yet reported, depends on the principle of *Doe v. Laming*.‡ The children themselves, in each of those cases, by the effect of the superadded words, took a fee as the stock of a new inheritance. In *Seaward v. Willoch*,§ the estate was given to the issue expressly for their lives only. The ground of decision was, that the will shewed a single intent to create a succession of estates for life, not warranted by law. And it could not be modelled as an executory devise, as in *Humberstone v. Humberstone*,|| in Chancery. But here the devise does not confine the estate to the children, to an interest for life; but, on the contrary, clearly means to give an inheritance.

It is argued, that he meant the children to take, if more than one, because he gives to one child, if there should be but one. No doubt that was his

* 6 Tau. 94. † In the K. B. ‡ 2 Burr. 1100.

§ 5 East 198. This was a devise to A. for life; and after him to his eldest, or any other son after him for life; and after them, to as many of his descendants, issue male, as shall be *heirs of his or their bodies*, down to the tenth generation, during their lives.

|| 1 P. W. 332. This was a devise to trustees to convey, &c. to children of unborn children for life, which the Court, upon *doctrines of equity* modelled, by decreeing conveyances to existing children for life, and to unborn children in tail, &c.

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intention, and that they should take as purchasers ; but he also intended that children's children, to the last generation, should inherit before the estate should go to the remainder-man. In the case of one child, he meant that the one child should take the inheritance ; and a limitation to children, or a child, as a class, is sufficient to give such interest. It is said, that in the power enabling appointment to the heirs of the body, there are no words of inheritance ; and that, therefore, the appointment of an estate of inheritance is not authorized by the power. But it is settled, that where there is a devise to the *heir*, although there are neither words nor intent expressed to give him the inheritance, and although the estate vests in him by purchase, as a person described, yet he may take the whole inheritance. *Burchett v. Durdant* * was decided on this principle. The objection was taken in that case, for the want of words of inheritance ; but the

* This case is reported in a former proceeding between different parties, but upon the same question and title, in 1 Ventr. 334, under the name of *James v. Richardson*. Upon the writ of error in the second proceeding it is reported, 2 Ventr. 311, under the name of *Burchett v. Durdant* ; and upon the point urged in the above argument, the Court certainly held that G. D. took an estate tail, upon the ground that *heirs* is *nomen collectivum*. But the Court further held, " that in case the first words, (*viz.*) "*heirs of the body now living*, would carry but an estate for life " to G. D. yet the subsequent words would make an entail in " him, (*viz.*) *and to such other heirs, male and female, as he* " *should hereafter happen to have of his body*. This would clearly " vest an entail in G. D. he being heir of the body of Robert, " and surviving Robert." This case is also reported by Keble, 3, 832, Pollexfen, 457, Jones, 99, Levinz, 2, 232, and Raymond, 330, as between James and Richardson : and in Carthew, 154, Skinner, 205, and Comberbach, 153, as between *Burchett v. Durdant*.

Court held it was *a fee* * in the person described, as heir of the body now living. Such limitation operates doubly; first, to point out the person, then to give the inheritance. That is an authority depending upon three judgments in the courts below, and two in this house. The children, therefore, in this case, must take an estate of inheritance, and for that purpose, William must take an estate tail. In *Wharton v. Gresham*,† although the devise was to *sons*,‡ one branch only of issue, the Court held, that the tenant for life had an estate tail. In *Hodges v. Middleton*,§ the words child or children are used throughout the will, the limitation over is on failure of children, not issue. The Court collects the intention to give the parent the inheritance; from the use of these words as a class. So in *Jones v. Morgan*,|| Lord Thurlow held, that where children are to take as a class, they must take as heirs.

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As to the argument founded on the word *such*, and its reference to the immediate antecedent *child*; the words are “for want of such issue;” and the fair construction, even grammatically, is not by a narrow reference to the last preceding object designated, but generally to all the limitations, to “heirs, issue, or children.” Reading all the clauses of the will together, it means in default of all the issue before named or specified. It is said, the testator himself has explained what he means

* This must be understood *fee-tail*, for such was the decision.

† 2 Black. Rep. 1083.

‡ It was to A. and his sons in tail male; and for want of such issue over, and A. had no issue at the date of the will, or at the death of the testator.—See *Wilde's case*, 6 Rep. 16.

§ Dougl. Rep. 415.—See post, p. 38. || 1 B. C. C. 206.

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by heirs of the body. But he does not say that children only are to take as heirs of the body ; but that they are to take in the first instance, the first in the order of succession. So in *Robinson v. Robinson*,* and *Pierson v. Vickers*,† the word *such* occurred, following the word “son” in the first, and “sons and daughters” in the latter case. Yet the Court held in both those cases, that the word “such” referred to issue generally, and was not restricted to sons and daughters. So also in *Doe v. Goldsmith*.

The question, whether cross remainders are to be implied between the children as tenants for life, ought to be decided for the satisfaction of the Plaintiffs in Error, if the judgment is against them. It ought to be ascertained by the judgment, which of the Plaintiffs below are entitled, that the Plaintiffs in Error may know the grounds on which they are deprived of the estate, if that should be the result.

The words *heirs of the body* having, in the present case, been considered to mean *children*, the subsequent words, “and for want of *such* issue,” were held by the judges in the Court below to refer only to children ; for *such*, it was said, is a word of reference. But why, it may be asked, not extend it to the *heirs of the body*, to whom the estate was expressly given ? There is certainly considerable evidence, on the face of the will, that the testator intended that William’s children should take by purchase ; but there is stronger evidence that he meant them to take such an estate as they could transmit to their issue, so as to include all, “the heirs of the “body of William issuing,” for want of which

* 1 Burr. 38, and 2 Ves. 225.

† 5 East. 518.

only he intended the estate to go over to his own right heirs. Some stress was laid upon the circumstance that the estate was expressly devised to William for his life. But that circumstance has been disregarded in similar cases, even where the strong negative words *only* and *no longer* have been superadded. But it is material in this view, that it shows, by opposition, that he did not intend the *children* to take life estates only. "To William for life, and after his decease to his children." Had he intended them also to take for life only, he would, of course, have said so. *Lord Mansfield* often truly observed, that when a man gives a house to one, he always means to give the entire interest in it, the same as if he had given him a horse. To effect this intention the Courts have gone great lengths, to supply by other words and implications, the want of express words of inheritance. This is the only case in which express words of inheritance have been cut down to life estates only, and this in order to effectuate a supposed intention, which in itself is absurd, and evidence of which is wanting on the face of the will.

It is said, the provision and devise, if one child, to that one, includes the other case, viz. of there being more than one, in which case they were all to take. Granted. But still it remains to show, that, because the children were to take, they were to take life estates only. "If but one child, the whole to that one child," *i. e.* the whole estate, and also the testator's interest in it. This is what the testator meant, although his meaning cannot in *this way* be effectuated. The gift over, "for want of such issue," afforded irresistible evidence of the

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intention that the estate should not go over until a general failure of William's issue. The force of those words was taken away by considering them to apply only to children. The will, as it stands by force of the decision in the Court below, is certainly a very different disposition from that which the testator intended to make.

The will made by the judgment in the Court below is to William for life: remainder to his sons and daughters as he shall appoint, but not giving them more than life estates: in default of appointment, to his sons and daughters share and share alike for their lives; and if there shall only be one child born, the whole to that one for life; and after the death of each child, his or her share over.

It was only by this construction that it was possible to weaken the force of the words "for want of such issue." *Lord Northington* has observed, that "for want of such issue," means for default of such issue. There is something, he adds, of peculiar force in this expression, and the law supposes the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue.* So *Mr. Justice Lawrence* said, in † *Pierson v. Vickers*, that these words are always construed to mean an indefinite failure of issue, unless restrained by other words. In this case there are no such words, nor any authority in the books for the construction which has been put upon the words actually used by the testator.

It is immaterial whether the words were *heirs of the body* or *children*, in either case the intention

* T. R. 227, note.

† 5 East. 552.

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 estate tail in the parent, but that does not prove
 that the testator intended the children to take for
 life only.

The following rules may be safely laid down :

I. That a devise may, in favour of the intention, include all a man's possible issue, although in terms only a particular class is included.

II. That if words are used which denote an intention to give the estate to the children by purchase, they shall take in that character, where they can take by force of the will, such an estate as will include all the issue, so that the estate may not go over before a total failure of issue.

III. That although such an intention is apparent, yet where the general intention, viz. to include all the issue, can only be effectuated by vesting an estate tail in the parent, he shall take that quantity of interest in opposition to the words of the will. The particular intent of the testator shall be sacrificed in favour of his general intent.

The leading authority on the first rule is *Robinson v. Robinson*.* There the testator devised his estate to Lancelot Hicks, for and during the term of his natural life *and no longer*, provided that he altered his name to Robinson, and lived at his house of Boclyne. And after his decease to *such* son as he shall *have* lawfully to be begotten, taking the name of Robinson ; and for default of *such* issue then, I bequeath the same to my cousin, Wm. R. and his heirs for ever. The judges certi-

* 1 Burr. 38, and 2 Ves. 225.

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fied that Lancelot must by *necessary implication* to *effectuate the manifest general intent* of the testator, be construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson, notwithstanding the *express* estate devised to him for his life *and no longer*.* This cause was decided the same way in the Court of Chancery; and afterwards, upon great consideration, was affirmed in the House of Lords.† It was the leading authority upon which *Lord Kenyon* decided many similar cases, all of which will be over-ruled, if the children in this case shall be held to take for life only.

The power in this case is in favour of the Plaintiff in Error; but we may strike out the power, without weakening the effect of the other words, upon the authority of *Settle v. Barter*.‡

In *Robinson v. Robinson*, the limitation, after Lancelot Hicks' decease, was to such son as he shall have lawfully to be begotten, taking the name; and for default of such issue over.

Will any lawyer attempt to distinguish the cases, with a view to show that Mr. Robinson intended to include all Mr. Hicks' issue, and that Mr. Pershouse did not intend to include all Mr. Wright's issue.

The case of *Robinson v. Robinson* is a decisive authority also in favour of the general construction of the words "for want of *such* issue." According to the decision of this case in the Court below, the will in *Robinson v. Robinson*

* And (it should be added, to complete the proof of the proposition,) the express devise to his son.

† 3 B. P. C. 180.

‡ 2 Bos. and Pull. 485.

should have been construed as giving an estate for life in Lancelot, with remainder to his first son for life, with remainder over. There no words like *heirs of the body* intruded themselves. It was not necessary to take away the force of any words, but merely to put a plain construction on the words which the testator had actually used; and they were simply to Lancelot for life, then to such son as he should have, and for default over.

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In the case of *Pierson v. Vickers*,* which was decided by *Lord Ellenborough, C. J. Lawrence, J. Grose, J. and Le Blanc, J.* the limitations were to the testator's daughter, Ann, and to the heirs of her body lawfully to be begotten, *whether sons or daughters*, as tenants in common, and not as joint tenants; and in default of *such* issue, to his sisters for their joint lives; remainder to a trustee to preserve contingent remainders: and after the decease of either of them, to all and every the child and children of, &c. *whether sons or daughters*, and their heirs and assigns for ever, as tenants in common, and not as joint tenants: it was held that Ann took an estate tail, notwithstanding the argument, that the testator had explained heirs of the body to mean children, viz. sons and daughters. How, said *Lord Ellenborough*, do you get rid of the words, "in default of such issue?" *Such*, it was insisted, had reference to sons and daughters. The testator, it was said, meant the estate to go over, if Ann left no sons or daughters living at her death. But

* 5 East. 548.

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Mr. Justice Lawrence asked, what is there in the will to confine the words, "in default of issue," to issue living* at the time of Ann's death? Because, (it was answered,) a fee was before given to the children;* but the learned Judge added, "these words are always construed to mean an indefinite failure of issue, unless restrained by other words." This is a decisive authority. Where is the distinction between the cases? The devise here, it may be said, is expressly to W. for life; whereas, the other devise, is in one sentence to Ann and the heirs of her body. But we have seen, that an express devise to a man for his life *and no longer*, is in these cases immaterial. It is immaterial, *Lord Thurlow* observes, in *Jones v. Morgan*, that the testator meant the first estate to be an estate for life. "I take it that in all cases the testator does mean so. I rest it upon what he meant afterwards. If he meant that every other person, who should be his heir, should take, he then meant what the law could not suffer him to give, or the heir to take as a purchaser. All possible heirs must take as heirs." If then we discard as utterly unwarranted by law this distinction, the next difference is, that the testator, in the supposed explanation of what he means by "heirs of the body," in the one case speaks of *children*, in the other of *sons or daughters*. *Children* is a stronger expression in favour of an estate tail than *sons or daughters*. Sons or daughters, it may be said, mean males or females. No doubt

* Not so expressly to the children of the daughter.

they do; but considered, as the words in our case have been in the judgment below, they mean males or females *who are* "sons and daughters," not males and females who are grandsons and grand-daughters. Besides, in *Pierson v. Vickers*, the testator had expressly in a subsequent part of the will said, that, when speaking of sons or daughters, he meant *children*, and children only. For in the devise over to the *children* of his sisters in fee, (who took strictly by purchase,) he says, "to their children, whether sons or daughters." Did this mean whether grandsons or grand-daughters? If not, how was that meaning collected in the prior part of the will, except from the very words which are found in the present case, and lead to the same construction. But in our case, it may be urged, that the testator says "if only one child," &c. The same thing is implied in *Pierson v. Vickers*, for it is quite clear that if there had been only one child, he was as competent to take as an only child in our case would be. In both of the cases there was a manifest intent to include all the issue. In the case of *Pierson v. Vickers*, that intent was effectuated in the face of obstacles which do not occur in this case. It is impossible that the decisions in the two cases can stand together.

The case of *Doe and Burnsall* * was relied upon as supporting the judgment in the Court below, but there the children *took the fee*; the words being large enough for that purpose; and therefore that case, like many others, must be classed under the second rule above noticed, and cannot govern a case

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* 6 Term Rep. 30.

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in which, if the children do take by purchase, the consequence may be, that neither they nor their issue may ever derive any benefit whatever from the devise.

The only cases which were relied upon in favour of the words "for want of such issue," being construed "and after the deaths of "the children," were *Hay v. Lord Coventry*,* and *Denn v. Page*.† But those cases differ, *toto calo*, from the present. There, after a regular provision for sons in tail, a limitation was added to daughters without words of inheritance; and for want of such issue over. That is not an improbable disposition, and cannot be compared with this case. Upon the judgment in *Denn v. Page*, Lord Kenyon has made the following observations:‡—"The case of *Denn d. Briddon v. Page*, has been relied on by the Plaintiffs in Error, where Lord Mansfield intimated an opinion that there was a blunder in the will. I find myself pressed by whatever fell from so great a judge, and it is always with doubt and distrust of my own mind that I differ from him in opinion; but I am not prepared to say that there was any blunder in that will. There the devisor gave to S. Nash, the son of T. and M. Nash, for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of S. Nash, and the heirs male of his and their bodies; then having provided for the male heirs (who are generally the favourites in cases of land-

* 3 Term Rep. 83. † And the note.

‡ In *Dacre v. Dacre*, 8 T. R. 116.

“ed property), it is not improbable that it should occur to the testator to provide for the present generation, and therefore he devised to all and every the daughters of the body of T. Nash, by his then wife, and for default of such issue, to the right heirs of T. Nash for ever. Now, when there is nothing in the will to lead to such a supposition, why should it be supposed that that was a blunder which brought forward the daughters of sons in preference to the issue of the sisters. I have known many cautious testators make limitations in their wills like that.” In the above case clearly all the children took by purchase; the sons express estates of inheritance, the daughters estates of freehold only. It was not a gift to *children* generally, but to daughters, a particular class of issue. And the words, “for want of such issue,” were satisfied by the previous estates of inheritance in the sons, and the life estates in the daughters. It never occurred to any judge that that case clashed with *Robinson v. Robinson*, or *Pierson v. Vickers*, which are clear and decisive authorities, that in a case like this, the words, “for want of such issue,” mean a general failure of issue.

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This is the first case in the books in which the force and operation of the words “heirs of the body” have been so frittered away; but even if it be conceded, that the testator has explained the words *heirs* of the body to mean *children*, yet it would equally follow, that all the posterity of William were intended to take.

In *Wilde's* case * there was a devise to A. for life,

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remainder to B. and the heirs of his body, remainder to Rowland Wilde and his wife, and after their decease ~~to~~ *to their children*, Rowland and his wife then *having a son and a daughter*, it was ruled that "they took joint estates for their lives: but if A. devise to B. and his children or issues, and he hath not issue at the time of the devise, the same is an estate tail." According to *Moore's* report, *Popham*, and *Gawdy*, held that Wyldes took an estate tail, notwithstanding that he had children living at the time of the devise, though Fenner and Clench thought it was only an estate for life, all agreed that it was an estate tail if no children. In the present case William had no children at the time of the devise or at the death of the testator.

So a devise "to William for the term of his life (as in the present case), and after his decease to the men children of his body; and if William die without man child of his body," then over was held to be an estate tail in *William*.* There are other authorities to the same effect.

The case of *Hodges and Middleton*,† bears closely upon this, if the words, heirs of the body, are to be read as children. There the devise was of real estate to A. and *at her death* to her children, and in case of failure of children, over. A. had issue living at the death of the testatrix, and at the date of the will. The court inclined to think that A. took in tail, but if she took only for life, they held that the children would take in tail. It is a powerful authority against the decision in the present case.

So in *Seale v. Barter*,‡ where the devise was

* 1 And. 43.

† Doug. 431.

‡ 2 B. and P. 485.

to the testator's son John and his children, lawfully to be begotten, with power for him to settle the same on them; and for default of such issue, over. John had no issue at the date of the will, and it was held that he took an estate tail.

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No answer was attempted to be given to these authorities, which directly prove that William Wright became entitled to an estate tail under Pershouse's will.

It is not necessary to demonstrate that the intention cannot be effectuated under the second rule. It is clear, that, if the children are to take by purchase, they cannot take all the interest which the testator intended. The very decision in their favour gives them merely life estates as tenants in common, which in event might not give to them *any* beneficial interest. In all the cases which it is possible to cite from the books, where the heirs have been held to take by purchase, the words of the will were sufficient to give them an estate, which would include all the issue for whom the testator intended to provide. There are several cases accordingly, in which, although the children taking by purchase, would take an estate tail; yet that construction was not adopted, because cross remainders could not be raised between them.*

The consequence of the exclusion of the case from the second rule, is, that it falls within the third. Certainly the intention that the children should take as tenants in common is incompatible with an estate tail in the parent; but it has long been the settled law of the land, that that circumstance shall give way to the general

* As to implication of cross-remainders, see post, p. 47, note.

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intention to include all the issue. *King v. Burchall*,* *Doe v. Applin*,† *Doe v. Smith*,‡ *Doe v. Cooper*,§ and *Pearson v. Vickers*,|| have decided this point beyond the reach of controversy. It will be conceded, that all William's possible issue can only take through him. He therefore, to effectuate the testator's manifest general intent, must be held to take an estate tail.

For the Defendants in Error—*W. E. Taunton* and *C. Puller*.

The ejectment was brought on behalf of the children; and an attempt was made to argue the case, on the ground that cross remainders were to be implied among the children. But as the heirs were made parties to the action in a distinct count, the Court refused to hear that argument; and the judgment was entered up on the count for the heirs, which might be applied in favour of the children. If cross remainders can be implied, the entry of the judgment is wrong. But this does not affect the substance of the case. The proposition to be maintained is, that William took only an estate for life, with remainder for life to the children. On the other side they contend that the testator had two intentions, and that one is paramount; viz. that the estate shall not go to the ultimate remainder man, until after an indefinite failure of issue. There is no such paramount intent. The testator designates the class of persons among whom the power is to be exercised, and gives the estate over, on failure of the ob-

* Ambl. 379. 4 T. Rep. 296. † 4 T. Rep. 83.

‡ 7 T. Rep. 531. § 1 East. 229. || 5 East. 548.

jects of the power, if they should not be living at the death of the tenant for life. That the words "heirs, or heirs of the body," have not always their strict technical meaning in so extensive a sense as the Plaintiffs in Error contend, it is sufficient to quote Archer's case.* That case is not indeed applicable in terms, which can rarely happen in the case of a will. But it may be cited to prove that there is no such essential virtue in the word heir, that it must carry the estate to all generations. *Walker v. Snow*,† *Lisle v. Gray*,‡ *White v. Collins*,§ *Lawe v. Davies*, || *Doe v. Laming*,** and *Goodtitle v. Herring*, †† may be adduced in proof of the same proposition.

In *Lawe v. Davies*, the devise was to B. and his heirs, lawfully to be begotten, that is to say, to his first, &c. sons successively to be begotten of the body of the said B.; and the heirs of the body of such first, &c. sons successively, &c. remainder over. That was held an estate for life in B. notwithstanding the subsequent limitation, to the heirs of the body of, &c. In the cases before cited, the words *heirs of the body*, or words equivalent, were contained in the instrument creating the limitations. Yet persons designated by those words were held to take by purchase. These words therefore may give less than the inheritance. In *Goodtitle v. Herring*, Lord Kenyon, speaking of

* 1 Co. 66. † Palm. 359.

‡ 2 Lev. 223. Raym. 278. § Com. Rep. 289.

|| 2 Lord Raym. 1561.

** 2 Burr. 1100. 1 Black Rep. 265. et vide 3 Durnf. and East's Rep. a note on this case.

†† 1 East. 264.

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the technical force of those words, in delivering judgment, says, "it never has been decided "that those words might not be otherwise explained in a will by the testator himself. They "were explained in *Lowe v. Davies*:" and afterwards he adds, "In former times indeed, "greater strictness was attributed to the meaning "of the words, 'heirs of the body.'" Here those words, as they are explained by the testator, are descriptive of the class of persons among whom the power was to be exercised; and it is the manifest intent of the testator, that if no such objects should be living at the decease of the tenant for life, the estate should go to the remainder-man.

The words of the will are to be weighed and considered, and also the fact that William was a natural son of the sister of the deviser. If the will had ended at the words "heirs of the body," where it occurs in the limitation over, for want of appointment, William, though the previous estate is to him expressly for life, would undoubtedly have taken an estate tail. As to the argument founded on *Seale v. Barter*,* if it is supposed to show that such a power of appointment is sufficient to give an estate tail, no such thing was decided in *Seale v. Barter*: nor do we argue that such power of appointment cannot possibly subsist with an estate tail, or that it is inconsistent with its nature. The limitations in *Seale v. Barter* are very different from the limitations in this case. In *Seale v. Barter* the question arose upon the codicil, which the Court held ought to be construed without reference to, or not to be

* 2 B. and P. 485.

controlled by, the will. By the codicil the estates were devised to J. S. and his children, lawfully to be begotten, with power for J. S. to settle the same on such of them as he should think proper; and for default of such issue, to, &c. Such a devise, without doubt, gave an estate tail to the son, no child of J. S. being in existence at the date of the will, or the death of the testator: and the Court properly held, that the power given to defeat or abridge the estate tail by appointment, did not of itself destroy that estate.

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In this case there is no paramount intention that the estate should not go over, but upon indefinite failure of issue. The words "heirs of the body" must receive a limited construction. The testator himself translates the words, and shows what persons he means by "heirs of the body." In the first instance, clearly he must mean the *children*. If so, can he in the subsequent use of the same words mean something different? To make the will consist with the construction attempted by the Plaintiffs in Error, a multitude of words must be struck out of the instrument, "*Share and share alike, as tenants in common; and if but one child, the whole to such only child.*" All these words must be expunged. According to their construction, the former clause of these words is inconsistent, and the latter superfluous.

The words, "in default of such issue," must refer to the issue contemplated, as objects of the power of appointment, not issue indefinitely. Between a devise over to right heirs, and to a stranger, there is a material distinction. In the former case the party dies virtually intestate: for the devise is in

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operative; the heir takes by descent. But where the devise is to A. B. and then over to a stranger, he can only take in the event specially provided by the testator. An heir at law is not to be disinherited, but by express words or necessary implication. A special object of bounty must bring himself within the intent of the testator. Here the plain intent is, that if there should be no children of William, the estate should go over to the sister. "Heirs of the body" cannot here consistently mean all generations of issue, as in case of an estate tail. The donee of the power could not have appointed so as to give indefinitely to his issue for ever. William, (for instance,) could not have appointed to his eldest son, grandson, great grandson. &c. The clear intent was, that he should limit to the children living at or before his death. Could he pass by the existing generation, and appoint to a future descendant, however remote? That is forbidden by the law against perpetuities.

The provision in default of appointment for the special event, if there *should be but one child*, that he should take the estate, manifests the intent of the donor, that the power should be exercised among *children*. There is but one case adverse to this construction, *Doe v. Goldsmith*.* It is an extraordinary argument to say that case is free from prejudice, because former cases were not there cited. That is rather a ground to impeach the authority of that case. If there is plain demarcation of the objects to which the words *heirs of the body* are applied, the power of appointment cannot be extended beyond them. The

* 7 Taunt. 209.

limitation over, is not in default of the issue of William, or generally, but in default of *such* issue, i. e. the particular objects of the appointment.

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“Heirs of the body,” in the clause conferring the power, and the limitation in default of appointment, means such heirs within a limited time, the life of William, the donee of the power. In default of *such* issue, can only mean such specific issue as before designated. There is, therefore, a total absence of the supposed paramount intention to give the estate over, only upon indefinite failure of issue. If so, the secondary, as it is called, being in fact the only intent, must prevail.

There are no words of limitation superadded, and consequently the children must take for life, according to the doctrine established in *Hay v. Earl of Coventry*.* There the limitation was to F. C. for life, remainder to her first and other sons in tail male; and in default of such issue, to the use of all and every the daughters of F. C. as tenants in common; and in default of such issue to his right heirs. That it is to “children” in one case, and daughters in the other, makes no difference in principle; and the limitation, over, is in the same words. The argument in that case, was not that it was to be presumed the testator did not mean to give an estate tail to the daughters, because he had expressly given one to the sons; but on the contrary, that the gift to the sons furnished a presumption of a similar intention as to the daughters, as appears by the judgment of Lord Kenyon, in which, upon this point he says, “I cannot find any words in the will to warrant

* 3 T. R. 83.

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“such” construction. If indeed, the word *such* “had, not, been introduced in this clause, we “might, perhaps, have said, that as issue is *genus* “*generalissimum*, it should include all the progeny. “But here the word *such* is relative, and restrains “the words which accompany it.”

In *White v. Collins*,* the first limitation was to F. for life, and after his death to the heir male of his body for life; and the limitation over was for default of *such* heir male. It was held to mean such as before mentioned, that is, an heir male who was to take for life. In the present case, for want of words of inheritance, it is, by construction of law, an estate for life in the children. That circumstance does not, in principle, make it different from the case of *White v. Collins*, where the estate is given to the heir expressly for life. *These are cases directly applicable, as authorities to the words of this will.

In the cases cited on behalf of the Plaintiff in Error, there was a paramount intent sufficient to over-rule the secondary intent. *Robinson v. Robinson* is the strongest of that class of cases, having words clearly indicating the intent, that the remainder should not take effect, but upon failure of all the issue of the particular tenant. The word used in the devise in that case, was *son* in the singular number. It was argued that the word was intended as *nomen collectivum*, meaning all the heirs forever, and that the limitation over was to be construed and guided by that intent. In the certificate that argument was adopted: and it is to be noticed that in *Robinson v. Robinson*, the tes-

* Comyns. Rep. 289.

tator at the end gave to L. H. the *perpetuity* of certain presentations *in the same manner* as he had given his estates.

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In *Wharton v. Gresham*,* there was an express limitation in tail.

As to the dictum quoted from *Jones v. Morgan*, there is no doubt that to enable all the heirs to take by descent, the ancestor must have an estate of descendible quality. That principle is not denied; but the words of the will in that case were different from the words in this.

In *Bennet v. Lord Tankerville*,† the limitation over was in case of dying *without issue of the body*, referring to the words *heirs of the body*, which had been used before. The intent that all the issue should succeed in turn, could not be effectuated without giving an estate tail to the parent, which necessarily enlarged the estate for life. In *Doe v. Aplin*, *Chandler v. Smith*, *Doe v. Cooper*, and *Pierson v. Vickers*, the intent is clear, that the estate should not go over, but upon indefinite failure of issue. And it is to be observed, that in all those cases, the limitation over is to a stranger, who is a gratuitous object of the testator's bounty, and must bring himself within the clear intent. In this devise the limitation over is to the heir.

Frank v. Stovin is the case of an estate tail by implication. So in *Colson v. Colson*, *Mogg v. Mogg*, and *Doe v. Webb*,‡ which were decided on special

* 2 Blac. Rep. 1083.

† 19 Ves. 170.

‡ 1 Tau. Rep. 234. The question in this case was upon a devise to F. and M. and A. and the heirs of their bodies respectively as tenants in common, whether cross-remainders could be implied between three devisees. It was decided in the affirmative,

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grounds. In *Burchett v. Durdant*, the first question was whether the first limitation by way of use was executed. The decision was, that the use was not executed. But the authority of the case on that point has since been questioned.* A limitation to permit A. to receive, &c. would be a use executed. The second point in that case was, whether the remainder was contingent or vested, it being to the heir of B. *now living*. There was a son living at the date of the will and death of the devisor. Under such circumstances, the court held it a description of the person, and a vested remainder.

In *Hodges v. Middleton*,† the word “*estate*” occurred in the first limitation, and it was given over on failure of *children*, that is, of *children* indefinitely, which creates an estate tail by implication, upon the same principle as the words *issue*, &c. *Lief v. Saltingstone* is not applicable. The power in that case was altogether different. The decision in that case established only this doctrine, that a power of appointment may extend to an appointment in fee. That is not inconsistent with an estate for life in the donee, but the contrary. By a decision in favour of the Plaintiff in Error, the doctrines of implication would be carried beyond all former bounds. Here the words of the will clearly import the immediate children of the tenant for life. These were manifestly the heirs of the body in the

on the ground of manifest intent appearing in the will that the estate should not be divided, but upon the limitation over go as an entirety.—See *Roe v. Clayton*, 6 East. 668, 1 Dow, 384.

* By Lord Holt in *Broughton v. Langley*, 2 L. Raym. 873. 2 Salk. 679.

† Dougl. 431.

contemplation of the testator. He has so explained himself.

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Gretton v. Haward,* *Goodtitle v. Woodhull*,† *Doe v. Goff*,‡ are all authorities in favour of the Defendant in Error, applicable generally in language and in principle, if not in precise circumstance. As in those cases, so in this, "*such issue*" must mean such descendants of William, to whom he might, and by the will it was intended, he should appoint, that is, children. No paramount intent is to be collected from the circumstances of the case. The fact that William was an illegitimate son, is adverse to his claim.

The Lord Chancellor.§ "It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will, must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent. The words *heirs of the body, prima facie*, mean all descendants; and it is likewise a rule of law,

* 6 Tau. 94.

† Willes, 592. The devise, in that case, was to a son for his life, and to his male children *for their lives*, and to the male children descending from them. The Court held, it was a life estate only in the son.

‡ Upon the citation of *Doe v. Goff*, Lord Redesdale observed, that the words there, "if such issue should depart this life before twenty-one, &c." were insensible, if the estates are given to the children for life. The estates in such case would go over, whether they die before or after.—See the judgment, post, p. 58.

§ At the conclusion of the reply.

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“ that all descendants should take under these
 “ words, unless they are clearly qualified and
 “ restricted by other words so as to give them
 “ a more limited sense. The great judicial diffi-
 “ culty arises in the application of these rules to
 “ the words of each will. I cannot admit that all
 “ the cases cited have been well decided: but it
 “ was hardly to be expected that judges should
 “ agree in the decision of all these cases; for the
 “ mind is overpowered by their multitude, and
 “ the subtlety of the distinctions between them.
 “ These difficulties make it the more necessary
 “ that we should deliberate before we determine
 “ this case. The decision ought to accord with
 “ former authorities, if possible; but, at all events,
 “ we must adhere to the established rules of legal
 “ construction.” *Cur. adv. vult.*

15th June.

*The Lord Chancellor.** The question to be de-
 cided in this case is expressed in the words to
 be found in the errors assigned, the principal of
 which is, that the Court, by their judgment, have
 decided “ that the said William Wright took only a
 “ life estate under the said will of the said E. Pers-
 “ house, with remainder to his children for life;
 “ and that the recovery suffered by the said William
 “ Wright, and Mary his wife, and Edward Wright,
 “ was a forfeiture of their estate. Whereas, the said
 “ R. Jesson, J. Hatley, W. Whitehouse, J. Watton,
 “ E. Dangerfield the elder, and T. Dangerfield, al-
 “ lege for error, that the testator intended to embrace
 “ all the issue of the said William Wright, which

* On moving the judgment.

“intention can only be effected by giving to the
 “said William Wright an estate tail, and the words
 “of the will are fully sufficient for that purpose.”
 I will not trouble the House by going through
 all the cases in which the rule has been estab-
 lished; that where there is a particular and a
 general intent, the particular is to be sacrificed to
 the general intent. The opinion which I have form-
 ed concurs with most, though not with every one of
 those cases. A great many certainly, and almost all
 of them coincide and concur in the establishment
 of that rule. Whether it was wise originally to adopt
 such a rule might be a matter of discussion; but
 it has been acted upon so long, that it would be
 to remove the land-marks of the law, if we should
 dispute the propriety of applying it to all cases to
 which it is applicable. There is, indeed, no rea-
 son why judges should have been anxious to set
 up a general intent to cut down the particular,
 when the end of such decision is to give power to
 the person having the first estate, according to the
 general and paramount intent to destroy the in-
 terest both under the general and the particular
 intent. However, it is definitively settled as a
 rule of law, that where there is a particular, and a
 general or paramount intent, the latter shall pre-
 vail, and courts are bound to give effect to the
 paramount intent.

This is a short will. The decision in the Court
 below has proceeded upon the notion, that no such
 paramount intent is to be found in this will. Here,
 I must remark, how important it is, that, in pre-
 paring cases to be laid before the House, great

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care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the Plaintiffs in Error, are to be found the words "ap-
" pointee in tail general of the lands, &c. therein-
" after granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. " I give and devise unto
" William, one of the sons of my sister Ann
" Wright before marriage, all that messuage, &c.
" to hold the said premises unto the said William,
" son of my said sister Ann Wright, for and dur-
" ing the term of his natural life, he keeping all
" the said dwelling-houses and buildings in tenant-
" able repair." If we stop here, it is clear that the testator intended to give to William an interest for life only. The next words are, " and from and
" after his decease, I give and devise all the said
" dwelling-houses, &c. unto the *heirs of the body*
" of the said William, son of my said sister Ann
" Wright lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control

and after it as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares" "and proportions as he, the said William, shall, "by deed, &c. appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the Plaintiffs in Error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession; William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, limitation, or appointment, then to *the heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

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It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs of the body," in this part of the will, must mean the same class of persons as the "heirs of the body," among whom he had before given the power to ap-

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point; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The Defendants in Error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body: but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "*for want of* such issue," which follow, it is said,

mean for want of children; because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the "words share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue") there is an end of the question. I do not go through the cases. That of *Doe v. Goff* is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary: because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is more important to maintain the rules of law, than to provide against the hardships of particular cases.

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Lord Redesdale. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson v. Colson*, it is clear that the testator did not mean to give an estate tail to the parent. If he meant any thing by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words, "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe v. Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should over-rule the particular, is not the most accurate expression of the prin-

ciple of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe v. Goff*, it has been held, that the words "*tenants in common*" do not over-rule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to over-rule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties: but look to the words used in the will. The words, "for want of *such* issue," are far from being sufficient to over-rule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "*such* issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The Defendants in Error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words

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"heirs of the body" to mean children in this will. I think it is necessary, before I conclude, to advert to the case of "*Doe v. Goff*." It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe v. Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean—they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe v. Goff* is not law.

In this case even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children, might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the

proportions would have been changed, and after-born children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

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Judgment reversed.

* * * *Franklin v. Lay*. My friend, Mr. Sugden, has kindly furnished me with the following note of this case:—

“ I give to my grandson, John Franklyn, all that my moiety
“ or half part of and in all that messuage, tenement, and farm,
“ lands and premises, situate, lying, and being in Great Brom-
“ ley, in the county of Essex, called the Brush Farm, as the
“ same is now in the occupation of my nephew, Wm. Barnard,
“ of Lawford, in the same county, farmer, to hold the said
“ moiety of the said farm, lands, and premises unto my grand-
“ son, John Franklyn, and to *the issue of his body* lawfully to be
“ begotten ; and to *the heirs* of such issue for ever, but subject
“ and chargeable with the payment of the mortgage of 400*l.* and
“ interest to my brother-in-law, Thomas Barnard, of Lawford
“ aforesaid, farmer. But if my said grandson, John Franklyn,
“ shall die without *leaving any issue* of his body lawfully begotten,
“ then I give and devise the said moiety of the said messuage,
“ farm, lands, and premises, with the appurtenances, unto my
“ said nephew, Wm. Barnard, and to his heirs for ever. *Held*
“ to be an estate tail in John.” *Franklin v. Lay*, Vice-Chan-
cellor, May 3, 1820.

IRELAND.

APPEAL FROM THE COURT OF CHANCERY.

MARIA ARABELLA Dowager Marchioness of Lansdowne	} <i>Appellant.</i>
The Most Noble HENRY Marquis of LANSDOWNE, and WILLIAM Earl of WYCOMBE, a Minor, by the said HENRY Marquis of LANSDOWNE, his Father and Guardian	
	} <i>Respondents.</i>

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POWER in a marriage settlement to grant to a wife any annual sum of money, or yearly *rentcharge to be tax-free, and without any deduction, and to be issuing out of and chargeable upon lands in Ireland*, so that such rentcharge do not exceed, in the whole, the yearly sum of 3000*l. of lawful money of Great Britain*. Held—that a rentcharge appointed under this power is payable in Ireland in the currency of England. But that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange properly so called. The *lex loci contractus* and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation.

In ambiguous contracts the domicile of the parties, the place of execution, the purpose and the various provisions and expressions of the instrument are material to be considered in the construction.

Courts of equity are not bound to adopt the opinion of the courts of law to which a case is sent for advice.

THIS was an appeal against an order and decree of the Court of Chancery in Ireland, in a suit instituted by the Appellant, for recovery of the arrears of her jointure charged upon the *lands* of the Respondents.

William Marquis of Lansdowne, the father of the Respondent, Henry Marquis of Lansdowne, being seized, for the term of his life, of several estates situate partly in England and partly in Ireland, with a remainder in tailmale to John Henry Petty, commonly called Earl of Wycombe, his eldest son, by deeds * of lease and release, bearing date the 16th and 17th days of May, 1794, and made between the said William Marquis of Lansdowne, of the first part; the said John Henry Petty, Earl of Wycombe, of the second part; John Cross, of Lansdowne House, in the county of Middlesex, gentleman, of the third part; John Willmott, of Bedford Row, in the said county, Esq., and Sir Francis Baring, of London, of the fourth part; and the Right Honourable Henry Richard Lord Holland, and Benjamin Vaughan, of London, Esq., of the fifth part; the greater part of the Lansdowne family estates, situate *partly in England* and partly in Ireland, (except certain lands in the barony of Ballycowen and King's County, Ireland,) were limited and assured, subject to certain incumbrances, then and still affecting different parts thereof,

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May, 1794.
Settlement of
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To the use of trustees, for a term of five hundred years, upon certain trusts thereby declared, with a proviso, that the said term should cease when the trusts thereof should be satisfied;

* It has been thought expedient to set forth this settlement with particulars as to the parties, their description, and domicile, and parts of the limitations and provisions not immediately in question, which, at first sight, may appear superfluous. The reason and excuse, for so full a statement, will be found in the arguments adduced in support of the judgment.

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which trusts have since been satisfied: and subject to the said term:

To the use of the said William, then Marquis of Lansdowne, and his assigns for his life, subject to impeachment for waste, except such waste in cutting down timber as should be committed with the consent of his son, then Earl of Wycombe, previously given by writing under his hand:

Remainder

To trustees to preserve contingent remainders:

Remainder

To the use of the said John Henry Earl of Wycombe, and his assigns, for his life, without impeachment of waste:

Remainder

To trustees to preserve contingent remainders:

Remainder

To other trustees, for a term of years, to raise portions for the younger children of the said Earl of Wycombe:

Remainder

To the first and other sons of the said Earl of Wycombe successively in tail male: Remainder

To the Respondent, Henry Marquis of Lansdowne, then Lord Henry Petty (second son of the said William Marquis of Lansdowne, and half-brother of the same John Henry Earl of Wycombe), for his life:

Remainder

To trustees, to preserve contingent remainders:

Remainder

To the first and other sons of the said Lord Henry Petty successively in tail male, with divers remainders over.

Recital in the
settlement of
1794, making

In this settlement, after reciting, in effect, that 22,150*l.* remained due to the said Marquis, on

account of certain purchases, valuations, and expenses therein mentioned or referred to (*and which purchases, valuations, and expenses were all calculated and made according to the currency of money in England*), it is further recited :

“ That the said Marquis and Earl had valued
 “ the manor of Readingstown, otherwise Raham,
 “ the towns and lands of Ballineur, and other
 “ lands, situate, lying, and being in the barony
 “ of Ballycowen, in the King’s County, in the
 “ kingdom of Ireland, theretofore the estate of
 “ Robert Reading, Esq. at the sum of 28,000*l.*
 “ of lawful money of Ireland, of the value of
 “ 25,846*l.* 3*s.* 1*d.* English : and that the said
 “ Marquis of Lansdowne and Earl of Wycombe
 “ had agreed that the said premises in the said ba-
 “ rony of Ballycowen, so valued as aforesaid,
 “ should be conveyed to the said Marquis of Lans-
 “ downe, his heirs and assigns, in discharge of the
 “ sum of 22,150*l.* remaining due to him, subject
 “ to the sum of 3696*l.* the surplus of the said sum
 “ of 25,846*l.* for which the said premises were va-
 “ lued as aforesaid, beyond the said sum of 22,150*l.*;
 “ and that the said sum of 3696*l.* should be se-
 “ cured to trustees, to be by them applied in such
 “ manner as the said Marquis of Lansdowne and
 “ Earl of Wycombe shall direct.” And the pre-
 mises were accordingly so conveyed.

The settlement also contained recitals and confirmations of two mortgages both of lands in Ireland : the one to the Drapers’ Company to secure the repayment of 30,000*l.* advanced by them, and secured upon lands in Limerick ; the other to a

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The Earl of
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Mr. Mills, to secure 12,000*l.* advanced by him; and secured upon lands in Kerry.

The powers to appoint by way of jointure, upon which the immediate question in this case arose, appear in the following terms :

“ Provided also, and it is further declared by
“ and between the said parties to these presents,
“ that notwithstanding any of the uses or limitations hereinbefore limited or contained, it
“ shall and may be lawful to and for the said Earl
“ of Wycombe from time to time, and at any
“ time or times either before or after his intermarriage with any woman or women he may
“ happen to marry, by any deed or deeds, instrument or instruments in writing, to be sealed
“ and delivered by him in the presence of, and to
“ be attested by, two or more credible witnesses,
“ or by his last will and testament, to be signed
“ and published by him in the presence of, and to
“ be attested by, three or more credible witnesses,
“ to grant, limit, or appoint to or to the use of
“ any woman or women with whom he the said
“ Earl of Wycombe shall intermarry or take to
“ wife, for the life or lives of such woman or women, and in full, or in part only, of or in the
“ nature of her or their jointure or jointures, and
“ in bar of her or their dower, to take effect immediately after the death of the said Earl of
“ Wycombe, *any annual sum or sums of money, or yearly rentcharge or rentcharges, to be tax-free*
“ and without any deduction, and *to be issuing out of, and chargeable upon, all or any part of the*
“ *said manors, messuages, farms, lands, tenements,*

" hereditaments, and premises, hereinbefore men-
 " tioned, and intended to be hereby granted and
 " released, *which are situate in the said kingdom of*
 " *Ireland* (other than and except the said manors,
 " hereditaments, and premises in the said county
 " of Kerry, mentioned in the said second schedule
 " hereunto annexed, or hereunder* written), so
 " that such rentcharge or rentcharges do not,
 " during the lifetime of the said Marquis of Lans-
 " downe, exceed in the whole the yearly sum of
 " two thousand pounds *of lawful money of Great*
 " *Britain*, and do not, after the decease of the
 " said Marquis of Lansdowne, exceed in the whole
 " the yearly sum of *three thousand pounds of*
 " *lawful money of Great Britain*, and so that
 " such rentcharges be subject, and without pre-
 " judice to, the aforesaid term of five hundred
 " years, and the trusts thereof. And it is hereby
 " further provided and declared, that in case the
 " said Earl of Wycombe shall, by virtue of the
 " power hereinbefore to him reserved, grant, limit,
 " and appoint to or for the use of any woman or
 " women with whom he may happen to inter-
 " marry, any such rentcharge or rentcharges,
 " annual sum or annual sums, as aforesaid, he the
 " said Earl of Wycombe shall have full power, by
 " the same or any other deed, or by his last will,
 " as aforesaid, to give or grant to such woman or
 " women, and her and their assigns, the usual
 " powers and remedies, by distress and entry, for
 " recovery of such rentcharge and rentcharges
 " when in arrear, and to limit all or any of the
 " said manors, messuages, farms, lands, tenements,

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“ hereditaments, and premises, chargeable there-
 “ with, to any trustee or trustees for any term or
 “ number of years, for the better securing the
 “ payment of such rentcharge or rentcharges as
 “ aforesaid, as to him the said Earl of Wycombe
 “ shall seem meet; so as such term and terms of
 “ years, in case any such shall be limited, shall be
 “ made defeazable on the full payment of the rent-
 “ charge or rentcharges thereby secured, and all
 “ arrears thereof, and all costs and charges relat-
 “ ing thereto.” *

To this settlement were annexed three schedules, containing the names of the tenements conveyed, and of the occupiers, and the rents at which they were respectively held, valued in Irish and English currency. This settlement was executed in England.

May, 1805.
 William Mar-
 quis of Lans-
 downe died.

William Marquis of Lansdowne died in May, 1805; and upon his death, John Henry, Earl of Wycombe, became Marquis of Lansdowne, and succeeded to the family estates under the limitations of the settlement.

John Henry
 Marquis of
 Lansdowne
 married the
 Appellant.

John Henry Marquis of Lansdowne married the Appellant in his father's lifetime. By a deed of appointment, bearing date the 20th of February, 1809, executed by him in the presence of, and attested by, two witnesses, after reciting the settlement of 1794, and the power of jointuring contained therein, and also reciting that he had resolved to exercise the said power of jointuring, and by virtue thereof to settle upon the Ap-

20th February,
 1809.
 His appoint-
 ment under
 the settlement
 of 1794, of

* The settlement also contained a power for Lord Henry Petty to charge lands in *England or Ireland*—with, &c.

pellant during her life, ^{1820.} if she should happen to survive him, a clear annuity or yearly rentcharge of three thousand pounds English money for her jointure, and in bar of dower and freebench; and to secure the payment thereof, by the means and in the manner therein mentioned: it was witnessed, that the said John Henry Marquis of Lansdowne, in consideration of his love and affection for the Appellant, his wife, and to make a suitable provision for her maintenance and support, if she should happen to survive him, and by virtue and in exercise of the power or authority given or reserved to him by virtue of the said settlement, and of any other power or authority whatsoever vested in, or enabling him in that behalf, did grant, limit, and appoint, that from and after the death of him the said John Henry Marquis of Lansdowne, the Appellant, his wife (in case she should happen to survive him), or her assigns, should and might have, receive, and take, during the term of the natural life of her the said Appellant, and for her jointure, and in lieu, bar, and recompense of her dower and freebench, of and in all or any of the freehold, customary, or copyhold estates of the said John Henry Marquis of Lansdowne, one annuity or yearly rentcharge of *three thousand pounds of lawful money of Great Britain, to be issuing out of, and charged and chargeable upon, 3000*l* a year, of lawful money of Great Britain, for her jointure.* all and every the manors, messuages, towns, lands, tenements, and hereditaments whatsoever, which the said John Henry Marquis of Lansdowne had power to charge with a jointure, under, or by vir-

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tue, or in pursuance of the said settlement of 1794 (except such hereditaments contained in the said settlement, if any, as had been sold or exchanged, in execution of the power in that behalf contained in the same settlement): to be payable and paid to the Appellant, or her assigns, at the common dining-hall of Lincoln's Inn, in the county of Middlesex, by four equal quarterly payments, &c. in every year, tax-free, and without any deduction; the first payment thereof to begin and be made on such of those days of payment as should happen next after the death of the said John Henry Marquis of Lansdowne: and also, that in case and so often as the said annual rent or clear yearly sum of 3000*l.* or any quarterly payment thereof, should happen to be behind or unpaid, in part or in all, by the space of fourteen days next after any of the said days of payment whereon the same ought to be paid as aforesaid, then and from time to time, as often as it should so happen, it should and might be lawful to and for the Appellant and her assigns to enter into and distress upon all and singular the said hereditaments and premises thereby charged with the same yearly rentcharge or sum of 3000*l.* or intended so to be, and every of them, or any part or parts thereof, in like manner as in the case of distress taken for rent, reserved by landlords on common demises for years; to the intent that the Appellant and her assigns might be fully satisfied and paid the same annual rent or clear yearly sum of 3000*l.* and every part thereof so in arrear

and unpaid, and all costs, damages, and expenses attending the taking such distress and distresses, or to be sustained by reason of the non-payment thereof, contrary to the true intent and meaning of the said appointment.

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And for the considerations before expressed, and for the more effectually securing the payment of the jointure, the said John Henry Marquis of Lansdowne, in further exercise and execution of the power given or reserved to him by the settlement of 1794, did, by the deed now stating, grant, limit, and appoint, that all the manors, messuages, towns, farms, lands, tenements, hereditaments, and premises thereinbefore charged with the said annual rent or sum of 3000*l.* or intended so to be, with their and every of their rights, members, and appurtenances, should, from and immediately after the death of him the said Marquis, remain and be (subject nevertheless and charged with the said annual sum or yearly rent, and the said powers and remedies for recovering the same) to the use of Sir Thomas Tyrwhitt Jones and John Dent therein described, their executors, administrators, and assigns, for the term of three hundred years, to commence and be computed from the death of him the said Marquis, upon certain trusts thereby declared, for better securing the payment of the jointure on the days whereon the same was thereinbefore made payable.*

* The appointment also contains the usual power of entry and perception of rents in the event of the jointure being unpaid for twenty-one days.

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The jointure
deed executed
in England,
and all the
parties resi-
dent there.

14th Novem-
ber, 1809.

John Henry
Marquis of
Lansdowne
died without
issue, leaving
the Appellant
his widow.

26th October,
1813.

Appellant filed
her bill in the
Court of
Chancery in
Ireland;

stating that
she had only
received £350l.
on account of
four years joint-
ture;

and that she
had applied to
the Respon-
dent, Henry
Marquis of
Lansdowne
for the arrears,
which he had
declined to
pay.

This deed also was executed in England; and at the time of the execution thereof all the parties interested therein were domiciled and resided in England.

John Henry Marquis of Lansdowne died without issue on the 14th November, 1809, leaving the Appellant his widow; and upon his death Lord Henry Petty, now Marquis of Lansdowne, his half-brother, succeeded to and entered upon and took possession of all the said estates in Ireland, under the settlement of 1794, the net rents of which estates produced about 30,000l. a year.

On the 26th day of October, 1813, the Appellant filed her bill of complaint in the Court of Chancery in Ireland against the said Henry Marquis of Lansdowne, William Earl of Wycombe, his eldest son, the Right Honourable Richard Lord Holland, and Benjamin Vaughan, Esq. Sir Thomas Tyrwhitt Jones, and John Dent, Esq. setting forth the deed of settlement, the appointment, and facts beforementioned, and stating (among other things) that, since the decease of the said John Henry Marquis of Lansdowne, four years of the said jointure of 3000l. had become due to the Appellant under the said deed of appointment of the 20th day of February, 1809; and that all payments which the Appellant had hitherto been able to obtain on account of it amounted only to a sum of 4350l.: and further stating, that the said William Earl of Wycombe was tenant in tail, under the said deed of the 17th of May, 1794; and that the Appellant had frequently requested the said Henry Marquis of

Lansdowne to pay the arrears of her said jointure, which he had declined doing; and that the Appellant had requested the said Sir Thomas Tyrwhitt Jones and John Dent, to raise and pay the arrears of the said annuity: and charging that the said William Marquis of Lansdowne, and the said John Henry, late Marquis of Lansdowne, resided in England at the time of the execution of the said deed of the 17th of May, 1794, and had always resided, and then intended to reside there, and used the words lawful money of Great Britain where they occur in the deed of settlement in their strict technical meaning; and also charging that in and by the same deed, where mention is made of certain lands in the King's County, which were assigned to the then Marquis of Lansdowne, at a valuation made in Ireland, the amount of the said valuation is expressed to be money of Ireland, in contradistinction to money of Great Britain; and it was by the bill submitted, that, if there be any ambiguity on the face of the said deed, the same ought to receive a liberal construction in favour of the Appellant, and of the powers given to the said late Marquis, who was the owner of the said estates; and that the said William Marquis of Lansdowne and the said late Marquis must have contemplated that the widow of the said late Marquis would continue to reside in Great Britain, and therefore have intended that her jointure should be payable there, and should not be chargeable with the costs of remittance or other expenses attending the payment of it in Ireland; and that, had they intended to depart from the usage,

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bill.

they would have expressed their intention so to do: and therefore praying, that the Appellant might be decreed entitled to the said jointure of three thousand pounds, as money is valued in Great Britain, and to be paid in London, according to the currency of that part of the said United Kingdom called England; and that the jointuring power created by the said deed of the 17th of May, 1794, might be decreed to be well executed by the late John Henry Marquis of Lansdowne, by the said deed of the 20th of February, 1809; and to that end, that it might be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account of what was due to the Appellant upon the foot of her said jointure of 3000*l.* yearly; and that the said Henry Marquis of Lansdowne might, by the decree of the same Court, be compelled to pay the same to the Appellant, when so ascertained; and that the said Sir Thomas Tyrwhitt Jones and John Dent might be compelled to aid and assist the Appellant in recovery of her just rights, according to such powers as they should have, or to permit the Appellant to proceed in their names, as she should be advised, indemnifying them against all costs; and that a receiver might be appointed to receive the rents, issues, and profits of the lands and premises in the said deed mentioned, or a competent part thereof, for payment of the Appellant's said jointure; and that, if necessary, the lands so subject to the Appellant's said jointure, or a competent part thereof, for the said term, might be sold for payment of the said arrears so due to the

Appellant; and that all necessary parties might join in making out a title to a purchaser.

The Respondent, Henry Marquis of Lansdowne, by his answer, admitted the marriage of the Appellant with the said John Henry late Marquis of Lansdowne, and the due execution of the settlement of 1794; and he believed that a deed appointing a rentcharge to the Appellant, by the said John Henry late Marquis of Lansdowne in 1809, had been executed in pursuance of the power given him by the said settlement of 1794, and that the same deeds were respectively to the purport stated in the Appellant's bill; and he further admitted, that, on the death of the late Marquis in 1809, he became possessed of the said settled estates, the net profits of which amounted to a considerable sum, and more than sufficient to answer the demand of the Appellant; and that applications had been made to him to pay in British money the charge claimed by the Appellant: and the said Respondent further admitted, that the said Earl of Wycombe, deceased, resided in England when the said deed of 1794 was executed, but denied that he had always resided there.

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The answer of
 the Respon-
 dent the Mar-
 quis of Lans-
 downe.

The Respondent, the Earl of Wycombe (the first tenant in tail of the said estates, under the settlement of 1794, expectant on the decease of his father, the said Henry Marquis of Lansdowne), being an infant by his answer submitted his rights to the protection of the Court.

The answer of
 the Respon-
 dent the Earl
 of Wycombe.

The answers having been replied to, and issue being joined in the cause, witnesses were examined on behalf of the Appellant and Re-

Issue joined
 and witnesses
 examined.

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May 27, 1814.

Order on hear-
ing, underwhich the par-
ties were toobtain the opi-
nion of theCourt of Com-
mon Pleas inIreland, whe-
ther the Ap-
pellant's join-
ture was pay-
able in Englishor Irish cur-
rency, and

where.

Michaelmas
Term, 1814.

Case argued.

spondents respectively, to prove the execution of the deeds, out of which the question arises, the marriage of the Appellant, and the domicile of the parties.

The cause came on to be heard before the Lord High Chancellor of Ireland, on the 27th of May, 1814, when his Lordship was pleased to order and

direct, "That the cause should stand over, with liberty for the parties to proceed to obtain the opinion of the Court of Common Pleas in Ireland, on the question, whether the annuity or jointure so payable to the Appellant, were payable in English or Irish currency, and where the same was to be paid."

A case was accordingly prepared, and argued before the Court of Common Pleas in Michaelmas Term, 1814; and the judges of the said Court, during the same Term, certified their opinion as follows :

Judges' certi-
ficate that the
jointure was
payable in
Irish currency,
and in Ireland.

"That the jointure of the said Marchioness of Lansdowne, in the said case mentioned, being a rent charged on lands in Ireland, is payable in Irish currency; and that the same is payable in Ireland."

Dec. 8, 1814.

Cause heard on
the judges' cer-
tificate.

The cause came on to be heard before the Lord Chancellor, on the certificate of the judges of the Court of Common Pleas, upon the 8th day of December, 1814, when his Lordship made the following decree :

Decree, that
the jointure
was payable in
Irish currency
in Ireland, and
not elsewhere.

"That, according to the true intent and meaning, and the legal operation of the deed of the 17th of May, 1794, in the pleadings mentioned, the Appellant is entitled to be paid the rent-

“ charge of three thousand pounds per annum,
 “ therein, mentioned, according to the currency
 “ of money in Ireland, and not according to the
 “ currency of money in Great Britain, and is en-
 “ titled to be paid the said rentcharge in Ireland,
 “ and not elsewhere; and the Defendant having,
 “ by his answer, offered to pay the same, it was
 “ referred to the Master to take an account of
 “ what was due upon the foot of the said rent-
 “ charge, after all just allowances; and it was fur-
 “ ther ordered, that all parties should abide their
 “ own costs.”

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Against this decree, and the order upon the original hearing, the appeal was brought praying that the House would so far reverse the said decree, as to direct, “ That, according to the true construction of the said deed of the 17th of May, 1794, the Appellant shall be paid her said jointure of *three thousand pounds yearly, according to the currency of money in England, and not according to the currency of money in Ireland, and that she shall be paid the same in England.*”

Appeal against
 the decree.

For the Appellant—*The Attorney General and Mr. Heald.*

It is a general rule, supported by many authorities, that money is to be paid according to the currency of, and at the place where, the contract is entered into, unless the parties to the contract specially agree otherwise.

Argument,
 May 3.

In this case the parties to the deed of 17th May, 1794, so far from specially agreeing otherwise, have thereby provided that the annuity shall

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be paid in lawful money³ of Great Britain, which must mean English currency. That they had their attention directed to the difference between English and Irish currency, appears from some of the provisions of the deed.

The annuity being charged on lands in Ireland, does not alter the rule before stated; if so, the 14th Geo. III. c. 79,* would appear to be unnecessary. * Contracts must be interposed according to the law of the place where they are executed.

John Henry Earl of Wycombe was a purchaser under the deed of 1794, for valuable consideration; and such deed is to be construed in the manner most beneficial to him.

The contract in this case, it must be presumed, had a reference to the country where the parties resided, and for that special reason⁴ the words "Great Britain" were introduced. The marriage was, in part, in consideration of the power, and the appointment was according to the power. The Court below seems to have considered the single circumstance that it was a rentcharge payable out of lands in Ireland. They disregarded the fact that the parties were resident in England, and

* The act was passed to remove doubts which had arisen from the statute, 12 Anne, St. 2, c. 16, as to the legality of contracts made between parties resident in Great Britain, for monies lent at interest beyond 5 per cent. upon the security of lands, &c. in Ireland and the West Indies and the assignment of such securities. It enacts that such contracts and assignments made and executed in Great Britain shall be as valid as if executed in the place where the lands, &c. lie—provided the money lent does not exceed the value of the lands, &c. mortgaged—and it provides that no penalties under the statute of 12 Anne shall be incurred upon such contracts for interest at the rate established in the country where the mortgaged premises lie.

and gave no effect to the words “ of Great Britain.”

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The Lord Chancellor. Have you the case sent to the Court of Common Pleas in Ireland? If it states no more than the printed cases it was not worth sending. The deed of settlement speaks of sterling English money, and of money of Ireland, showing an advertence to the distinction. Whatever may be the effect of the *lex loci contractus*, or that the money is to be paid, as a rent-charge issuing out of lands, in cases where no provision is made by the deed, or instrument of contract: the rules of law arising out of those circumstances are inapplicable to a case where the instrument itself furnishes the means of interpretation. Upon looking at the various expressions of the deed, the first striking question which occurs is, whether *sterling English* and *lawful money of Great Britain* do not mean the same thing?

Lord Redesdale. The provision with respect to the 22150*l*, and the same for 3696*l*, the surplus of the valued estate is clearly English money. There is one respecting the money payable out of the Buckinghamshire estate, which is not expressed to be either English or Irish.

For the Appellant. The contract may be, and apparently is, for lawful money of Great Britain payable in Ireland. By this construction the distinction taken in *Phipps v. Lord Anglesea* * is

* 5 Vin. Abr. Condition Q. b. 8. v. post, p. 88.

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avoided. The *Lord Chancellor* of Ireland was of opinion that the money ought to be paid in English currency, but thought himself bound by the certificate of the judges of the Common Pleas. No one of the sums to be paid under the settlement were of Irish currency. The only passage, in which the expression occurs, is in the valuation of lands, where nothing is expressed as to currency. In the provisions for younger children, and power to jointure wives resident in England, it is to be implied that the parties meant English money. In the absence of special provision, it might as well be argued, that the English money lent in England, upon the mortgage to M. is to be repaid in Irish currency. What will be said of the power to Lord H. Petty, which extends over English as well as Irish estates. That cannot be construed to mean Irish currency, and how lawful money of Great Britain can be so construed is difficult to conceive.

Lord Redesdale. There is no lawful money of Ireland; it is merely conventional. There is neither gold nor silver coin of legal currency—nothing but copper.

For the Appellant. The valuation of the lands having been made in Irish currency by Irish surveyors, was afterwards, for the purposes of the settlement, calculated in English currency: that fact appears by the deed itself.

For the Respondents—*Mr. Horne* and *Mr. Abercrombie*.

The question turns entirely on the power.

Lord Redesdale. What is the difference between lawful money of Great Britain and sterling money? In the statute,* under which the Lord Chancellor receives his salary, the amount is fixed in English money, which is called sterling: that amount is afterwards computed and expressed to be 10,833*l.* 6*s.* 8*d.* Irish currency. There is no such thing as Irish money; it is Irish currency.

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For the Respondents. No distinction is to be taken between lawful money and sterling money. In the case of *Phipps v. Lord Anglesea*, the clause, providing the jointure for the wife, directed† that the payment should be *without abatement*, which words are omitted in the provision‡ as to portions for the daughters; and that part of the case was decided upon the ground that it was to be considered as a sum in gross, and not as a rent *issuing out of the lands.*§

The question is not always decided by the place of contract. In *Robinson v. Bland*,|| where the question was upon a bill of exchange, a contract

* 42 Geo. III. c. 105, s. 1.

† This appears only by allegation, *arguendo*, of the counsel for the Defendants, in the case cited, who represent it to be "a rent to be paid at London without any deduction for exchange."—See 5 Vin. Abr. 209.

‡ The portions for the daughters were to be raised by a term vested in trustees for that purpose.

§ But Parker, C. who decided the case, commences his judgment, by saying, "the portion ought to be paid here where the contract was made and the parties resided, and not in Ireland where the lands lie charged with the payment;" and he relies upon the intention of the parties.

|| 2 Burr. Rep. 1077.

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of a transitory nature, the judges held, that it was demandable only in England, because the parties had a view to payment in England. In this case, it appears, from the very circumstance of limiting the power of charging to lands in Ireland, that the parties had a view to payment in Ireland, although they were resident in England. In *Wallis v. Brightwell*,* the testator demised his lands in Ireland to a trustee for a term of years, in trust, to pay to his wife, during her life, 80*l.* a year out of the rents. A trust, to pay a sum out of rents, is materially different from a charge upon lands; and in that case there was, moreover, the specialty noticed in the judgment, that the testator, upon leases of part of his Irish estates, had reserved rent to be paid in London tax-free, which was just sufficient to pay the annuities given by his will. In *Saunders v. Drake*,† the testator residing in Jamaica at the date of his will, but having friends in England as well as Jamaica, gave some legacies to be paid in sterling money; others he gave generally; and *Lord Hardwicke* decided that the general legacy was payable in the currency of Jamaica. No place of payment being specified in the deed giving the power, the default, if made, and the consequent remedy, could only be in Ireland. They might (and if that had been the intention, would) have provided that the money should be payable in England: not having done so, the case is left to the general operation of the law.

* 2 P. W. 88.

† 2 Atk. 465.

By the general rule of law,* an annual sum chargeable on lands is payable on the land, and in this respect differs from a sum in gross secured on land which is payable to the person, where no place of payment is expressly appointed. In this case the legal effect of the contract is, that the money which the parties to the deed had power to charge upon lands situate in Ireland only, is payable in Ireland, and in Ireland only. There is no personal obligation to pay, nor personal remedy to enforce payment; the power is to charge certain lands, situate in Ireland, with a rentcharge. The whole subject-matter is local by the very nature of the contract. The grantee of a rentcharge (and the appointee of a rentcharge is as such grantee) is to demand it where he can find his remedy; that is to say, upon the land.† It was argued for the Appellant, that the rule of law is, that contracts are to be judged according to the law of the country where such contracts were made, and that this deed, having been executed in England, was to be construed accordingly; but that rule extends only to personal contracts, and is confined to contracts to be performed within the country where they were made. It is a rule as general and recognised,‡ that contracts entered into with an express view to the law of another country, and to be performed in another country, are to be judged of according to the law of that

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* Co. Lit. 210 (b.) 211 (a.)

† Gilb. on Rents, 8vo. Irish edition.

‡ Or an exception to the general rule before stated.

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country wherein they are to be performed. *Consuetudo, et statuta loci in quem est destinata solutio respicienda sunt.** In this sort of contract the parties contracting to settle or limit lands in England and Ireland, and giving the power in question to charge lands in Ireland only; must be implied to have contracted with a view to the law of that country where the lands lie, and upon which the contract was to be performed, and their contract ought to be construed accordingly. Such was the rule according to the civil law. “*Verum tamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Nam contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit.*”†—Lord Mansfield adopts the same distinction in *Robinson v. Bland*.‡ In delivering his judgment, he says, “The parties had a view to the laws of England. The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed;” and in reasoning on the

* Sir John Davies’ Reports, Case of mixed money, in the last resolution near the end. The passage quoted is from Budelius de re Nummaria, l. 2, c. 21, and it is there applied to contracts between merchants.

† Hub. lib. i. tit. 3, n. 10. The passage quoted occurs in the title “De conflictu Legum,” and is specially applied in that place to the subject of marriage contracts. Its general application seems to be borne out by the authority of the last resolution in the “Case of mixed moneys.”

‡ 2 Burr. 1078.

circumstances in that case, he observes, " Now
 " here the payment is to be in England: it is an
 " English security, and so intended by the par-
 " ties," and adopts the reasoning of counsel—
 " That Sir John Bland could never be called upon
 " abroad for payment of this bill, till there had
 " been a wilful default of payment in England.
 " The bill was drawn by Sir John Bland, being in
 " Paris, *upon himself in England*, payable ten days
 " after sight." So in *Sir John Champant v. Lord*
Ranelagh.* " A bond made in England was sent
 " over to my Lord's correspondent in Ireland, and
 " *the money to be paid there*, and it was not men-
 " tioned what interest should be paid, and the Lord
 " Keeper was of opinion that it should carry *Irish*
 " interest." Upon a careful review of all the
 cases, it will be found that whenever the law of
 the place of contract has been allowed to influence
 the construction of the instrument, there was no-
 thing local in the terms of the contract as to its
 performance.

As to the argument raised upon the words
 " lawful money of Great Britain." British money
 is current in England; so is it current in Ire-
 land; but not at the same rate. The same con-
 stitutional prerogative, which stamps its cur-
 rency in England at one rate, ascertains its cur-
 rency in Ireland also at another rate. Money,
 by the law of Ireland, ought not to be current
 at one rate, and payable at a different rate,
 respecting a contract to be there performed.
 That mixed money, does not import English

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* Prec. Chan. 128.

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currency, appears from "The case of mixed'money;"* which has established the construction uniformly since given to these words in Ireland, as not denoting money according to *English currency*, but merely money of *English coinage*. In Ireland these words have a definite meaning.

In granting a power to create a rentcharge to a given amount, the parties cannot well be implied to have intended that a greater rentcharge might be created under the words used, than could be levied by distress on the lands, according to the law of the country where the lands lie; and it is clear law in Ireland, that under a distress and avowry for a rentcharge of 3000*l.* lawful money of Great Britain, no more could be levied than 3000*l.* of Irish currency, although the party might insist upon payment in *money of the coinage of England*. The common printed forms of bonds and other instruments used in Ireland are in these terms; and yet it never has been attempted to recover upon these instruments according to *English currency*; so well ascertained is the meaning of the words "lawful money of England." In truth, a different decision on these words would operate to improve considerably the situation of all obligees in Ireland, and to injure that of obligors, who have in all cases signed bonds for payment of lawful

* Davies' Rep. *qua supra*. The case of "mixed moneys" is more favourable to the Respondent's argument than it is here represented. For, upon a contract to pay 100*l.* sterling, lawful money of *England*, it was held in the Privy Council, upon the opinion of the judges, that a tender of mixed moneys was sufficient.—See a short abstract of that case in a note at the end of this case.

money of Great Britain, upon the general understanding and hitherto received legal construction, that these words did not import the currency, but the coinage of the money.

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This annuity being charged on Irish land, it must be intended to be Irish money; it could only be recovered by process in Ireland.

These parties certainly understood, and took the distinction between English and Irish money, as appears by the recital of the valuation of part of the lands; but in the clause in question the language is varied. The jointure is limited to 3000*l.* *lawful money of Great Britain*; but there is no direct power to charge the estate with lawful money of Great Britain. The power is merely to charge; and the words *tax-free*, and without deduction, relate to the taxes of Ireland.

The Attorney General in reply. The attention of the parties having been called to the distinction, as appears by the valuation, what could they mean, by using the words *lawful money of Great Britain*, but to distinguish it from Irish currency?

The Lord Chancellor. How would they deal with a recital, that a man having advanced 12,000*l.* sterling, it is provided that he shall receive 12,000*l.*? Would they contend he must receive so much less?

The Attorney General. That is precisely the case upon the mortgage to Munday, which is for 30,000*l.* This is no question between landlord and tenant upon a distress for rent. If the power had been to charge dollars, no objection could be raised on the part of the tenant. Is the power given? That is the sole question.

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The Lord Chancellor. The power is clearly to charge an annuity of 3000*l.* lawful money of Great Britain. If the donee had exceeded the power, the appointment would have been void at law—in equity it might have been good except for the excess. But what has a court of law to do with that question?

The Attorney General. It was not argued in Ireland that the appointment exceeded the power, which must have been the case if their construction is right.

*The Lord Chancellor.** It is difficult to imagine how this case found its way into a court of equity, except on the ground of calling upon the trustees to act. If the Appellant is entitled, as grantee of a rentcharge, she might have proceeded to enforce her legal remedy by distress.* It is stated that the Lord Chancellor of Ireland, after the return of the certificate from the Common Pleas, retained an opinion contrary to that certificate, but made the decree according to it, from deference to the judges of the Common Pleas. In that surely there must be some mistake. For, although it is highly useful in legal questions to resort to the assistance of the courts of law, yet it must be well known to those experienced in the practice of courts of equity, that they are not bound to adopt the opinion of the courts of law to which they send for advice. It has occurred to me to send the same case successively to the Courts of King's Bench and Common Pleas, and not to adopt the opinion (though highly to be respected) of either of those courts.

* At the conclusion of the reply.

If ~~this~~ were the case of a simple charge of 3000*l.* on lands in Ireland, the place of contract, the domicile of the parties, the place appointed for payment, and other circumstances, might require consideration, and would furnish the ground for the decision of the case: but the instrument itself must, in this case, give the rule of decision,—a settlement making various arrangements, some like to the provision in question, others different from it. It was impossible that the Court of Common Pleas should have given a satisfactory opinion upon the question, if the case was sent nakedly to them without a statement of the deed. It will be proper that we should carefully inspect every part of the deed before we decide whether the judgment ought to be affirmed or reversed.

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The Lord Chancellor. This is a question, whether, under an instrument purporting to be an appointment, according to a power, of an annuity of lawful money of Great Britain, the sum is to be paid in lawful money of England, at the rate of English or of Irish currency. May 5.

Before I state the instrument containing the power, I ought to observe, that, upon looking at the settlement, I perceive it was expedient and proper to raise this question in equity; because, by the deed of settlement, various terms of years were created for various purposes, and the remedy in a court of law might have been defeated, if those terms had been set up to obstruct such proceeding.

The Lord Chancellor of Ireland, it is said, was of opinion that the annuity was payable in English currency; but thought fit, nevertheless, to direct a case for the opinion of the Court of Common

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Pleas, in which the question raised, was, whether the annuity or jointure was payable to the Appellant in English or Irish currency, and where payable. The Court, whose opinion was desired, certified, that the jointure being a rentcharge upon lands in Ireland was payable in Ireland, and in Irish currency. The reason for this opinion is to be collected only from the certificate, namely, that it is a charge upon lands in Ireland. We are not informed of any other reason. If that were the simple case, the matter is clear according to settled principles of law. But in this case the question is to be decided by the intention expressed in the deed of settlement. The meaning is to be collected from the words immediately applicable to the point, from the context, and from *all parts of the settlement*.

This is a power to charge the lands with a jointure of "lawful money of Great Britain." The appointment is made according to the authority, and in the words of the power. The question is whether these words can be said to mean Irish currency. In the naked case of a charge upon lands the law is clear and settled; but upon wills and instruments of marriage contract all the cases cited authorise a distinction. In such cases the intention of the person making the will, and of the parties to the contract, is to be collected from the different parts of the instrument. The case of *Phipps v. Earl of Anglesea* is to be found in three books,* but is most fully reported in Viner's Abridgment.

* 5 Vin. Abr. 209, part 8. 2 Eq. Ca. Abr. 220, part 1, 754, part 3. 1 P. W. 696.

According to that report, by a settlement made upon the marriage of the Earl of Anglesea with the daughter of the Countess of Dorchester, a term of five hundred years was created in trust to raise 12,000*l.* for the portions of daughters. The parties to the settlement resided in England, and upon a bill filed in Chancery by a daughter, the sole issue of the marriage, and her husband, to have the portion, with the rest of her fortune settled, the first point raised in Court, was whether the 12,000*l.* portion charged by means of the term of years upon lands in Ireland should be paid in England without any abatement or deduction for the exchange from Ireland to England. After hearing arguments, which, in many respects, were similar to those urged in the present case, the Chancellor of that day was of opinion that the portion ought to be paid where the contract was made and the parties resided, and not in Ireland where the lands lay charged with the payment, for that it was a sum in gross, and not a rent issuing out of land; that it was certainly the intention of the parties that the portion should be paid in England, and not to send the young lady into Ireland to get her portion. In that case, as the facts are stated in the report, it was a question simply upon a charge of a sum of money for a portion upon estates in Ireland, there were no such words as *sterling*, or, as in this case, *lawful money of Great Britain*.*

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* It is singular, that, although (in Viner's Report) nothing appears in the statement of the facts of the case, nor, in the report of the judgment, of any specification as to the kind of money to be paid, but simply that 12,000*l.* is to be raised; yet,

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It is true, that, in *Phipps v. Lord Anglesea*, the distinction is taken in the judgment which was urged in this case at the bar, that there it was a sum in gross, and not a rent issuing out of land : but that seems to be in answer to that part of the argument in that case, which is founded on the different expressions of the settlement as to the jointure of the wife, and the portions of the daughters. As to the former, which is by name a rentcharge, it is provided that it shall be paid in London *without deduction for the exchange* ; whereas, in the declaration of the trust of the term created for raising the portion these words are omitted, and it is only said in trust to raise 12,000*l.* Upon this point of the argument the Court seems to have been of opinion, that, in the case of a rentcharge, the addition of such words might be necessary ; but that the question as to a sum in gross, (which the portion in that case was considered to be) was to be decided on circumstances, and accordingly the decision rests, in substance, upon the domicile and the presumed intention of parties resident in England, that a portion secured for a daughter should be, paid to her in England. That case decides nothing which can rule the present case ; and although it may be inferred from that case that the Court thought, that, in the simple case of a rent charged upon lands in Ireland, it would be payable in Ireland, and in Irish currency, yet nothing in the argument for the defendant, where the language of the settlement is discussed, and the provisions as to the jointure and the portions are contrasted, this passage occurs : “ *It is only said* “ (as to the term for raising the portions) in trust to raise and pay “ out of the premises the sum of 12,000*l. of good and lawful* “ *money of England, &c.*”

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is to be concluded from the case as to what the judgment would have been in the case of a rent-charge of lawful money of Great Britain.

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The case of *Saunders v. Drake*,* shows, that whatever the rule may be in the simple case of a rent-charge,—in a devise the construction must be according to the intention. In that case the testator being domiciled, and, making his will in Jamaica, gave, in the first place, certain legacies to be paid in *sterling money*, and immediately after two legacies are given by the will, without any direction that they should be paid in sterling money. The person who claimed one of the latter legacies filed a bill claiming payment of his legacy in English currency. *Lord Hardwicke*, in that case, was of opinion, that the residence of the person devising must decide the question as to the legacies given generally; but where directed to be paid in sterling money, they ought to be paid in the currency of England, although the testator resided in Jamaica. So, if the question now before us had occurred upon an Irish will, the rule established in *Saunders v. Drake* would authorise our deciding that a legacy, given in the words contained in this power, must be paid in the lawful money of Great Britain, that is, in the currency of England.

In *Wallis v. Brightwell*,† again, it appears, that intention is to furnish the rule of decision. There the testator living with his wife in England, by his will, made in England, devised his lands in Ireland to a trustee for five hundred years in trust, out of the rents and profits to pay 80*l. per annum* to his wife for life. It was argued, in that case,

* 2 Atk. 465.

† 1 P. W. 88.

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that no place being appointed for payment, and the fund being in Ireland, the annuity ought to be paid in Irish currency, or subject to the charge of remittance; but the *Lord Chancellor* decided, that the will being made in England, where all the parties to the contract resided, and this being a provision for a wife, it should be intended that the provision was estimated in the money of the country where the will was made. He added, that if one, by will made in England, gives a legacy of 80*l.* it must be intended of English money, and it will be the same thing though charged on lands in Ireland. In that case, although the words are simply to pay out of rents, &c. 80*l.* the intent presumed from domicile and other circumstances prevailed. Must we not, *à fortiori*, where the words are to grant a rentcharge of 3000*l.* lawful "*money of Great Britain*," presume a similar intent under similar circumstances?

So again, in *Pearson v. Garnett*,* *Lord Kenyon* said, he was tied down by the authorities; and held that unascertained or general legacies must be paid in the currency of the country where the will is made.

If this be the rule of law in the case of a legacy, where the party must claim under the voluntary benefaction of the testator, will it not, *à fortiori*, apply to a case where the party is a purchaser? In this case, it must be remembered, the appointment, under a power given by contract, is of a sum of 3000*l.* a year, lawful money of Great Britain; and such sum must be paid in such lawful money, unless the instrument of contract, in

* 2 Bro. C. C. 38, 46, 226, Prec. in Chanc. 201, n.

all its other parts, manifests a clear intention to the contrary. Now, without going through the provisions of the settlement, it is enough to say, there is not a page of it in which it does not appear that the annuity to be charged is payable in lawful money of Great Britain.

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True, it is a rentcharge, but upon that the only question will be what is the quantum of the rentcharge? How it is reserved is immaterial, whether in guineas, sovereigns, or dollars. It need not be in money at all. If it had been in loaves or oatcakes, the principle of decision would have been the same. There are throughout the settlement charges on English as well as Irish estates. Can it be said, as to any of these charges, that a different sum is to be paid to the person entitled, according to the site of the estates out of which the money is drawn? In those instances, where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract, show that they meant English currency. In the schedule annexed to the settlement, the Irish estates are valued according to Irish currency, and then it is reduced to English. If the parties have, in the schedule, recognised the distinction, and shown an intention to compute in English currency, how can I understand that they make no distinction, or have a different meaning in the body of the deed? Even in the body of the deed the distinction is taken and acted upon with respect to the compensation given to the Marquis of Lansdown.

The question, looking at the whole deed, is whether the power is duly exercised by granting a

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rentcharge of 3000*l.* of lawful money of Great Britain. If the power gave him authority to do so it is sufficient.

It is said to be the practice in Ireland, (but I never heard of a decision to the effect,) that a bond given for 3000*l.* lawful money of Great Britain could be discharged by paying 3000*l.* of Irish currency.

In this case the decision must be grounded upon the construction of the instrument before us.

There is a point remaining to be noticed, which did not form part of the argument at the bar of the House, although it is included in the certificate, and adopted by the Court of Chancery; namely, the question, whether the annuity is to be paid in England or in Ireland. Upon this, it is to be observed, that the power is to charge Irish lands with so much lawful money of Great Britain. It is not, however, such a power, that it is necessarily to be inferred that the money must be paid in England. The appointment directs it to be paid in Lincoln's Inn Hall; but we can only decide that the power is well executed, so far as it charges on the lands a sum of 3000*l.* lawful money of Great Britain. As to the cost of exchange, the appointee may be liable to that deduction. I found my opinion upon the short reason, that, by the appointment, 3000*l.* of lawful money of Great Britain is given according to the power, and that such a provision, from the expressions and the whole frame of the contract, seems to have been contemplated by the parties.

Lord Redesdale. There is no doubt, that, according to the intention of the parties, and the legal operation of the appointment made under

the power, this rentcharge is to be paid in lawful money of Great Britain, and at the rate of English currency.

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No part of the deed of settlement furnishes a ground to infer that the money to be charged should be paid in Irish currency. As to exchange the case is different. The currency is always the same: the rate of exchange depends on circumstances, which may cause a gain or loss upon payment in either country. If the proceeding had been by distress, a tender of 3000 sovereigns would have put an end to the distress, and the tender must have been where the proceedings took place. The right of demand and payment was certainly in Ireland. In that part of the appointment, which directs payment in Lincoln's Inn Hall, the donee has exceeded his power. The proceeding in equity, and not by distress, was necessary in this case, because the term of five hundred years might have been interposed and defeated the distress; but a court of equity could only decree payment of the sum charged into court, or to the individual, suing by his agent, in lawful money of Great Britain. The court could not decree that 3000 sovereigns should be sent to the claimant in England. There is, therefore, no doubt that the money is payable in Ireland. The question then is, whether the money is payable in Irish currency which is not expressed, or in lawful money of Great Britain which is expressed in the deed? In all cases of a similar description upon legacies, where the word "sterling," or some word equivalent has been used, the money has been held payable in English cur-

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rency, even although the testator was resident out of England. In some particular cases * it has been inferred, from circumstances, that the money was payable not only in English currency but also in England: but there is no ground for such inference here. The decree itself drops the words "lawful money of Great Britain," which was a necessary omission to make it consistent. To have said that 3000*l.* of lawful money of Great Britain should be paid in the same sum of lawful currency of Ireland, would have been contradictory, for the one would exceed the other by eight and a half *per cent.*

The decree orders that all parties shall abide their own costs, which is contrary to the provision of the deed; but no alteration can be made here in that respect, as it is not made the subject of appeal.

Lord Lauderdale. If lawful money of England is paid in Dublin, the only deduction to be incurred would be the price of the purchase of a bill, or the cost of conveyance. There is a great difference between paying a sum in English money in Dublin, and paying the same sum in Dublin, according to the difference of exchange, in which the value of the Irish currency is computed.

May 8.

The Lord Chancellor. Upon looking at the cases, it appears that the appeal extends to the question of costs; and as the term given, according to the power to secure the annuity, provides for the payment of all "costs and charges relating thereto," we think the reversal ought to be with costs. As to the other points it will be sufficient to reverse the decree on further directions. The reference to

* *Phipps v. Lord Anglesea, Wallis v. Brightwell, qua supra.*

the Court of Common Pleas was according to the course of a court of equity, and ought not to be impeached.

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Lord Redesdale. Care should be taken, in framing the cases, to show what are the points of appeal. No one could have imagined, from reading these printed cases, that the reference to the Common Pleas was a ground of appeal.

July 3, 1820.—Ordered and adjudged, that the decree of the 8th of December, 1814, so far as it orders, adjudges, and declares, that according to the true intent and meaning, and the legal operation of the deed of the 17th of May, 1794, in the pleadings mentioned, the Appellant, is, and she was thereby decreed, intitled to be paid the rent charge of 3,000*l.* per annum therein mentioned, according to the currency of money in Ireland, and not according to the currency of money in Great Britain, and so far as it orders, adjudges and decrees that, the Respondent having offered to pay the said rent charge accordingly, it should be referred to one of the masters of the said court of chancery, to take an account of what is due on the foot of the said rent charge after all just allowances, and that all parties should abide their own costs; be and the same decree is hereby so far reversed. And it is declared, that according to the true intent and meaning, and the legal operation of the said deed of the 17th of May, 1794, the rent charge therein mentioned, of 3,000*l.* of lawful money of Great Britain, is to be deemed a rent charge of 3,000*l.* of lawful money of Great Britain, and not a rent charge of 3,000*l.*, according to the currency of money in Ireland, and that according to the express words of the said deed of the 17th of May, 1794, the term of years thereby authorised to be created for better securing the payment of such rent charge, was to be made defeasible only on full payment of such rent charge, and all arrears thereof, and all costs and charges relating thereto: and it is further ordered and adjudged, that the Appellant is entitled under the deed of the 20th of February, 1809, to an annuity, or yearly rent charge of 3,000*l.* of lawful money of Great Britain, to be issuing out of and chargeable on the lands in the said deed mentioned, and to all costs and charges sustained by non-payment thereof, and the Respondent having offered to pay the said rent charge as a rent charge of 3,000*l.* according to the currency of money in Ireland, and not as a rent charge of 3,000*l.* of lawful money of Great

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Britain, it is further ordered, that it be referred to the master to whom the said cause stands referred, to take an account of what is due to the Appellant, on the foot of the said rent charge, as a rent charge of 3,000*l.* of lawful money of Great Britain, after all just allowances, and of all costs and charges sustained by non-payment thereof, and particularly so much of the costs of this suit as have been occasioned by non-payment of the said rent charge: And it is further ordered and adjudged, that so much of the said decree as declares that the Appellant is entitled to be paid the rent charge to which she is entitled, in Ireland, and not elsewhere, be affirmed, and that as to so much of the costs of this suit as have been occasioned by her claim to be paid the said rent charge in England, the parties do bear their own costs.

In the case of mixed monies, as reported by Sir John Davies, the contract was by bond, upon condition to pay at a future day 100*l. sterling*, current and lawful money of *England*, at the tomb of Earl Strongbow, in Christ Church, Dublin. The bond was executed in April, 43^o Eliz. upon a purchase of wares, by a merchant of Drogheda, from one Gilbert, of London, and at a time when *the pure coin of England* was current in Ireland. Before the day of payment specified in the bond, Queen Elizabeth, in order to pay the troops of the royal army which had been many years employed in Ireland, in the suppression of Tyrone's rebellion, caused a great quantity of mixed monies, with the stamp of the Arms of the Crown, and the inscription of her Royal style, to be coined in the Tower of London, and transmitted to Ireland, and a proclamation was issued, bearing date the 24th of May, 43^o Eliz. declaring those mixed monies to be lawful and current money in *the realm of Ireland*, and commanding all her subjects and others using traffic and commerce in *that kingdom* to receive those monies in payment of debts, &c. Brett, the obligor, tendered the mixed monies in payment, and whether the tender was sufficient to save the forfeiture of the bond, was the question, which was brought before the *privy council*, where Gilbert, being a merchant of London, exhibited a petition against Brett, for the speedy recovery of his debt. Upon advice of the judges, the council resolved that the tender was sufficient.

See 1 Eq. Ca. C. 36 (E). Under that title, pl. 2. the correctness of the Report in 2 Vernon 395, of the case of Lord Ranelagh v. Sir J. Champant, is doubted, and in Prec. in Ch. 108, where the same case is reported; it is said that Irish interest was allowed. See the Authorities on this head, collected in Mr. Raithby's Edition of Vernon, ii. 395.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

THOMAS LIDWILL, Esq. *Appellant.*

WILLIAM HOLLAND P.—Trustee
and Executor of THOMAS LID- } *Respondents.*
WILL, Esq. deceased, and others }

By a marriage settlement, containing the usual limitations, the husband, having a life estate in reversion, expectant upon the death of his father, was empowered when in possession under the limitations of the settlement, to revoke, &c. as to so much and such part of the premises conveyed, “as shall be then in possession of any one or more tenants, by virtue of any one or more lease or leases, whereon a rent or rents, not exceeding 300*l.* by the year in the whole, shall be reserved, &c. so as there shall not, at the time of such revocation, be less than twenty years, or three lives, unexpired of such lease or leases.” The clause of the settlement conferring the power concluded, with a declaration, that it was the true intent and meaning of the parties that the husband should, at any time during his life, after he should come into, and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper.

The husband (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l.* or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs, and assigns. Afterwards the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, &c. The lands

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revoked, appointed, and devised, except a very small part, to the value of 8*l.* a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will; but, in a suit instituted on behalf of creditors and legatees, to carry the trusts of the will into execution, it was found and reported by the officer of the Court that the lands so appointed and devised were of the value of 300*l.* a year. By the decree in that suit the will was established, and the revocation and appointment held valid; and, upon appeal to the House of Lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed.

Marriage settlement dated
13th and 14th
January, 1774.

BY indentures of lease and release, dated 13th and 14th January, 1774, (being the settlement executed previous to the marriage of Thomas Lidwill the younger, and E. J. O'Grady) certain lands held upon leases for lives, with covenant for perpetual renewal, the property of Thomas Lidwill, the elder, for life; remainder to T. L. the younger, for life; remainder to his sons, in tail male; remainder to M. L. (the Appellant's father) for life; remainder to the sons successively of M. L. in tail male, &c.

By the indenture of release, power was given to T. L. the younger, and the other tenants for life in remainder after him, when in possession, to demise or let all or any part of the premises, for any term not exceeding three lives, or thirty-one years in possession, and not in reversion, at the best improved rent, without fine.*

* A power of leasing as to part of the lands in settlement, was also given to Thomas Lidwill the elder. But the original deed of settlement was not produced upon the hearing of the appeal, nor was the power set forth in the printed papers upon this subject. See the Censure of the Lord Chancellor, p. 124.

The release also contained a power of revocation, by which it was provided that T. L. the younger, after he should be in possession of the premises, might, by any writing under his hand and seal, attested by two witnesses, or by his will attested by three witnesses, revoke, alter, or determine, all or any, the use and uses, estate and estates before limited, “ *as to so much and such part of the premises as shall be then in possession of any one or more tenant or tenants, by virtue of any one or more lease or leases, whereon a rent or rents not exceeding 300l. by the year, in the whole, shall be reserved and payable during the continuance of such lease or leases, so as there shall not at the time of such revocation be less than twenty years or three lives unexpired of such lease or leases; and that from and immediately after the execution of such revocation, Standish Grady and Richard Lalor, (trustees in the settlement) and the survivor, &c. shall stand seized of such part of the premises, concerning which such revocation shall be executed for the use of T. L. the younger, his heirs, and assigns, and that he and they shall and may hold and enjoy the same, and receive to his and their own use the rents, &c. clear of the rent reserved out of the premises, or any of the uses, &c. before expressed. It being the true intent and meaning of these presents, and of the parties hereunto, that the said Thomas Lidwill the younger, shall at any time during his life, after he shall come into, and be in the actual possession of the said hereby granted and released* ”

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Power of Revocation in
said marriage
settlement to
Thomas Lid-
will the
younger.

The parties to
said marriage
settlement do-
clare their in-
tent and mean-
ing of the
power of Re-
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to Thomas
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“ premises, have an absolute power and dominion
“ over so much thereof as shall be of the clear
“ yearly value of 300*l.* sterling, and be at full
“ liberty to dispose of the same in such manner,
“ and to such uses and purposes as he shall think
“ proper.”

Thos. Lidwill,
the elder, died
Nov. 1782.

Thomas Lidwill the elder died in November, 1782, whereupon Thomas Lidwill the younger became seized of the lands of Clonmore, &c. under the settlement of the 14th January, 1774.

Deed of Re-
vocation dated
20th Dec.
1782.

By indenture dated the 20th December, 1782, signed, sealed, and delivered, by Thomas Lidwill the younger, attested as by the deed of settlement required, and made between Thomas Lidwill the younger of the one part, and Standish Grady and Richard Lahor of the other part, reciting the marriage settlement and the power of revocation therein contained, and that the lands of Coologenafrian or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging, and part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, *then produced a clear yearly rent of 300*l.** or thereabouts; and were part and parcel of the lands mentioned in the marriage settlement; Thomas Lidwill, in execution of the power of revocation, and of all and every other power and authority in him being or him thereunto enabling, for the purpose of revoking, altering, making void, and changing all and every the use and uses, trusts and limitations, in the deed contained, so far as the same related to the 300*l.* a year, did declare, order, direct, limit,

and appoint, that Standish Grady and Richard Lalor, and the survivor of them, and the heirs and assigns of such survivor, should stand, and from thenceforth be seized of that part of the lands in the settlement mentioned, called Coologenafrin or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging; and that part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, together with all and every their rights, members, appendances, and appurtenances thereto, or to said lands of Mucklonemore, otherwise Clonmore, Coologenafrin, and Coologenvodeale, belonging or in any wise appertaining,

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To hold to the only proper use, behoof, and benefit of the said Thomas Lidwill, his heirs, and assigns, for ever; and to, for, and upon no other use or uses, trust, intent, or purpose whatsoever, any thing therein, or in the marriage settlement contained, to the contrary in any wise notwithstanding. It being thereby declared to be the true intent and meaning of the said deed of revocation, and of the parties thereto, to carry into execution the said power of revocation as fully and effectually as in them lay, according to the true intent and meaning of the said deed, and of the parties thereto, so as that Thomas Lidwill, his heirs, or assigns, or Standish Grady and Richard Lalor, and the survivor of them, and the heirs of such survivor, in trust for Thomas Lidwill should, from the day of the date of the deed of revocation become, and then were actually seized and possessed of the revoked lands, to the only

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proper use, behoof, and benefit of said Thomas Lidwill, his heirs and assigns for ever; and it was thereby agreed that it should and might be lawful for Thomas Lidwill, his heirs and assigns for ever, thereafter, to have, hold, and enjoy the revoked lands and premises with the appurtenances: and to have, receive, and take to, and for his and their own use and benefit, the yearly rents, issues, and profits thereof, separately and apart, and free and cleared, and absolutely discharged from the rent payable out of the lands of Clonmore to the head landlord, by virtue of the original lease, or renewal or renewals thereof, to be thereafter had by virtue of the covenant of renewal in the original lease; and of and from the payment of all and every, or any part whatsoever of such renewal fine or fines which then were, or thereafter might become payable by virtue of the original lease or renewals to be thereafter had thereof, and freed, acquitted, exonerated, and discharged of and from all or any and every of the use and uses, estate, trusts, charges, and limitations contained in the marriage settlement; and from all manner of judgments, mortgages, or incumbrances whatsoever, which could or might affect the lands.

16th June,
1809, Thomas
Lidwill the
younger died.

On the 16th June, 1809, Thomas Lidwill the younger died, without issue male, having no other property but in the lands, subject to the revocation, and indebted to several persons, leaving his widow, Elizabeth Julia, and the Respondent, Mary Grady, his only child, and heiress at law.

His will, dated
13th June,
1809.

By his will, dated on the 13th of June, 1809,

and duly executed and attested in the manner required by law for devising freehold estates, reciting, that he was entitled to 300 acres of the lands of Clonmore or Graffin, under and by virtue of his marriage settlement, and to dispose thereof as he should think proper; he devised and bequeathed all his right, title, and interest in and to the said 300 acres of the said lands of Clonmore or Graffin, and all other his estates of what nature or kind soever which he should die seized possessed of, or entitled to at the time of his decease, unto the Respondents, John Maherg and William Holland P. and the survivor of them, and his heirs, executors, administrators, and assigns in trust, to sell and dispose thereof, and out of the monies arising from such sale, to pay all his just debts, ~~funeral~~ expenses, and the several legacies therein mentioned, and, among others, a sum of 2,500*l.* which he bequeathed to the Respondent, Mary Grady's children, and thereof appointed the Respondent, Mary, residuary legatee, and William Holland P. and John Maherg his executors.

William Holland P. alone proved the will in the proper ecclesiastical court in Ireland; and on 5th January, 1810, being trustee and executor, and also a judgment creditor of T. L. filed his bill in the Court of Exchequer in Ireland against the Appellant, (who had become intitled as next in succession, under the limitations of the deed of settlement,) and others, stating the indentures of 14th January, 1774, the power of revocation therein contained, the deed of revocation of the 20th December, 1782, and also the will of Thomas

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OTHERS.5th January,
1810, bill filed
for a sale of
revoked lands
for payment of
debts and le-
gacies of Tho-
mas Lidwill
the younger;

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Lidwill the younger; and charging that Thomas Lidwill, at the time of his death, owed several sums of money by judgments and otherwise; and that he bequeathed the several legacies therein mentioned, to the persons therein named, and insisted that the deed of the 20th of December, 1782, (which was not then in the possession of William Holland P.—) was a due execution of the power of revocation, and that even if the same had not existed, the will was in itself a sufficient execution of the power, and that, if defective, the Court would set it right; and praying that the Defendants might set forth what estate or interest they claimed in the lands revoked, and that the trusts of the will might be carried into execution; and that it might be declared that the power of revocation had been well executed by Thomas Lidwill; and that accordingly the revoked lands might be sold by the decree of the Court for the purposes mentioned in the will; and that in the mean time, until such decree should be obtained, a receiver should be appointed to receive the rents, and that an account might be taken of Thomas Lidwill's personal estate, and of his debts, legacies, and funeral expenses; and that, the marriage settlement and deed of revocation might be lodged in Court.

Defendants
answered said
bill, and cause
heard on
pleadings and
proofs; and on
13th May,
1813, decree
made.

The Defendants having filed their answers to the bill, and issue being joined, witnesses were examined, and publication of their depositions having passed, the cause came on to be heard on the 13th of May, 1813, on pleadings and proofs, when the Court decreed, that the trusts of the will of Thomas Lidwill, deceased, in the

pleadings mentioned, should be carried into execution, and that the proper officer should take an account of his real estates, and the rents, issues, and profits thereof, into whose hands the same came, and how applied; and also an account of his personal estate, and the nature and value thereof, into whose hand the same came, and how applied, and of his debts, legacies, and funeral expenses, and of all charges and incumbrances affecting his said real and freehold estates, and the nature, priority, and amount thereof, and what was due thereon respectively, and whether any and which of them had been paid, and out of what fund: the officer was also directed to inquire and report, whether, on 20th December, 1782, the lands of Coologenafrian or Graffin, containing 300 acres, with ~~the bog~~ and common thereunto belonging; and also the said part of the lands of Clekile, containing about 41 acres, together with about 14 acres of bog thereunto belonging, comprised in the deed of 20th December, 1782, in the pleadings mentioned, or any and of which of them, or any and what part thereof were in the possession of a tenant or tenants having, at the time of the date of said deed of 20th December, 1782, a term or terms of three lives, or twenty years, then to run of their lease or leases;* and if he should find that the entire of the lands *were not in the possession of such tenant or tenants at the time (when the deed of revocation was executed),*

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Inquiry directed
as to leases,
or value of the
lands.

* Against this part of the decree no objection, in any shape, appears to have been made.

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that then he should *state the clear yearly value of the lands at that time, and how much and what parts thereof were of the clear yearly value of 300l.* on the 20th December, 1782; and if the officer should find that any part thereof was, at that time, in the possession of such tenant or tenants as aforesaid, then he was directed for so much to take the reserved rents as the value; and that the officer should also inquire and report, whether any and what other part of the lands comprised in the settlement of the 14th January, 1774, were in lease to a tenant or tenants having, on the 20th December, 1782, three lives, or twenty years unexpired of such lease or leases.

27th December, 1813,
Plaintiff filed
his charge.

28th January,
1814, Appellant
filed his
charge and
discharge.

The Respondent, William Holland P.—the Plaintiff, on 27th December, 1813, filed his charge under said decree, and the Appellant, on the 28th of January, 1814, filed his charge and discharge to Plaintiffs said charge; and among other things charged and contended before the officer, that he was entitled to be repaid as a creditor of Thomas Lidwill, the younger, certain sums in his said charge mentioned, out of the real freehold and personal estate of Thomas Lidwill; and further charged that the whole of the lands in the deed of revocation of the 20th of December, 1782, were then unset and out of lease, and that no part thereof was in possession of a tenant or tenants, having, on the 20th of December, 1782, a term or terms of three lives or twenty years then to run; and that parts of the lands comprised in the marriage settlement of 14th January, 1774, and distinct from the lands comprised in the deed of

revocation of the 20th of December, 1782, were in lease to tenants having, on the 20th of December, 1782, three lives or twenty years unexpired of such lease or leases.

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The Appellant also insisted, that the lands comprised in the deed of revocation exceeded the clear yearly value of 300*l.* on the 20th December, 1782, and contended before the officer, that those lands were of considerably greater value at that time.

On the 3rd of November, 1815, the officer reported (among other things) that Thomas Lidwill, deceased, in the pleadings mentioned, died seized of a real estate in the lands of Coologenafrian or Graffin, and also in part of the lands of Clekile, with the bogs and ~~common~~ thereto belonging, comprised in the deed of the 20th of December, 1782, and that Thomas Lidwill was not at the time of his decease seized of any other real or freehold estate.

November 3,
1815, officer's
report.

The officer also found that Thomas Lidwill, by his will, dated 13th June, 1809, charged all and singular his real estates with the payment of his debts and legacies (in the report mentioned), and directed his trustees, therein named, to sell the same for payment thereof; and that Thomas Lidwill was indebted, at the time of his decease, to several persons therein particularly named in the several sums therein mentioned, amounting, in the whole, to the sum of 7512*l.* 17*s.* 4*d.*, and that the debts and legacies were charges and incumbrances affecting the real estate of which Thomas Lidwill died seized.

He further found, that there was one tenant

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who occupied a part of the lands of Coologenafrin or Graffin, on the 20th of December, 1782, of whose lease a term of $23\frac{1}{4}$ years was then unexpired, at the yearly rent of 8*l.*, but did not find that there was any other tenant or tenants on the 20th of December, 1782, in possession of any part of the lands of Coologenafrin or Graffin, or of the part of Clekile, mentioned in the deed of the 20th of December, 1782, under any lease thereof, of which a term of three lives or twenty years was then to run.

He also found, that, on the 20th December, 1782, the part of the lands under lease were of the yearly value of 8*l.*, taking the same at the reserved rent, and that the remainder of the lands of Coologenafrin or Graffin, and the lands of Clekile, and the bogs and common thereto belonging, in the said deed of revocation mentioned, were, on the 20th day of December, 1782, of the yearly value of 292*l.* (both said sums making together the yearly value of 300*l.*) and no more, and that no further or other part of the lands of Mucklonimore, otherwise Clonmore, comprised in the marriage settlement of the 14th of January, 1774, were, on the 20th day of December, 1782, leased or demised to a tenant or tenants having, on the last-mentioned day, a term for three lives, or twenty years, unexpired of their said lease or leases.

9th November,
1815, Appellant
filed four
exceptions
thereto.

Thomas Lidwill, the Appellant, on the 9th of November, 1815, filed four exceptions* to the officer's report, because he had not reported cer-

* The matter of these exceptions form no part of the present appeal.

tain claims of the Appellant, as incumbrances affecting the revoked lands.

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February 17,
1816, final de-
cree.

On 17th February, 1816, the cause came on to be heard on the report, exceptions, and merits, when the Court ordered, that the first and fourth exceptions should be over-ruled, without prejudice to any suit then depending, or which might thereafter be instituted as to the matter thereof, and that the second and third exceptions should be also over-ruled, and the report confirmed; and that the defendant (Appellant) should in one kalendar month, to be computed from the date thereof, bring in and lodge in the Bank of Ireland, to the credit of the cause, with the privity of the accountant general of the Court, the sum of 1303*l.* 2*s.* 5*d.*, being the balance of the rents, issues, and profits of the revoked lands and premises remaining in the (Appellant's) hands; and that the register should tot up the interest of the several sums in the decree particularly mentioned, due to the several creditors and legatees therein named; and that the Defendants, or such of them as ought so to do, should, in three kalendar months, to be computed from the date of the decree, pay to said William Holland P., and to the several other creditors and legatees therein named, the several sums therein mentioned, with interest from that day until paid, with costs to the persons therein named; or, in default thereof, that the chief remembrancer of the Court, or his deputy, should set up and sell by public cant, to the highest and fairest bidder, the said revoked

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lands and premises in the decree particularly mentioned, or a competent part thereof; and that out of the monies arising by such sale, the Plaintiff, William Holland, P. and the several other creditors and legatees therein named, should be paid the respective sums therein mentioned due to them, and that the remainder (if any) of the money arising by such sale, should be disposed of as the Court should thereafter think fit: and that all proper and necessary parties should join with said chief remembrancer, or his deputy, in executing proper deeds of conveyance to such person or persons as should be declared the purchaser or purchasers of the lands and premises, or such parts thereof as should be sold; and that either party should be at liberty to apply to the Court in the mean time for such further and other directions as might be necessary; and that the other Respondents should recover their costs expended by them, in the cause, out of the money arising by such sale; and that the Plaintiff, W. Holland, might accordingly make up and enrol the decree, with costs as aforesaid, for the performance whereof, the process of the Court was, from time to time, to issue as in such cases usual.

The several sums so decreed due to the creditors of Thomas Lidwill, the younger, amounted to 7512*l.* 17*s.* 4*d.*, and to his legatees 4824*l.*, and Plaintiffs taxed costs, to 470*l.* 0*s.* 11*d.*, making, in all, 12,806*l.* 18*s.* 3*d.*, exclusive of Respondent Grady's and the other parties' costs, which amounted to a considerable sum.

On the 5th of June, 1816, the lands were put up to sale by public auction, pursuant to the decree: the Respondent, Henry Grove Grady, was declared the highest bidder at a sum of 6000*l.*: the sale was confirmed, and out of purchase money advanced by the Respondent, Henry Grove Grady, the creditors and legatees of Thomas Lidwill the younger were satisfied.

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This appeal was presented against the decrees of the Court of Exchequer, by the remainder-man next in succession, under the limitations of the settlement upon the decease of T. L. the donee of the power.

For the Appellants—*Mr. Hart* and *Mr. Phillimore*.

Whether the power to revoke the uses of the settlement by the said Thomas Lidwill the younger be considered (as intended to be executed by him) either by the deed of revocation of the 20th day of December 1782, or by his will; such executions of the power were both defective (except as to a very small part of the lands in question), since a power can only be regarded as duly executed, when all the conditions and circumstances required by the deed or instrument creating it are complied with.

Argument for
Appellant,
May 16, 1820.

An express condition is explicitly stated in the deed of settlement, creating the power by which Thomas Lidwill the younger is restricted, in his exercise of the power, "to so much and such part only of the lands in question, as should be then in the possession of any one or more tenant or tenants, by virtue of any one or

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The condition annexed to the execution of the power, requiring that the lands over which it should be exercised should be held for a term not less than three lives, or twenty years, at the time of the execution of the power, was not introduced into the settlement without due consideration or a sufficient reason. One object of it was to relieve the remainder-men from the difficulty, at a future and possibly a remote period, of showing the value of the lands at the time of the execution of the power,—a difficulty which would occur if the lands were either actually out of lease, or held for a term nearly expired, a difficulty which the Appellant has actually experienced in this cause. It was also intended to guard against a fraudulent execution of the power, by first letting the lands at low rates for a short term, and then executing the power of revocation. It was considered by the parties to the settlement containing the power, that leases for three lives, or of which twenty years were unexpired, must be supposed to have been granted under the leasing power, and con-

sequently, at the best rent, and, therefore, that the rent reserved in such leases would be a fair criterion of value.

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Neither by the deed of revocation of the 20th day of December, 1782, nor by the last will of Thomas Lidwill the younger, is the restriction or condition annexed to the power strictly complied with, save only as to a very small portion of the lands in question.

If the intended execution of the power by the deed of revocation of the 20th day of December, 1782, be duly considered, it will be found defective or fraudulent, since there is in that deed an express but false recital, stating that the lands in question were then actually leased to solvent tenants, who had ~~more~~ ^{less} than twenty years or three lives then to run and unexpired of their leases, and that the lands produced a profit rent of the clear yearly value of 300*l.* or thereabouts, (thus explicitly admitting and recognising, on the part of Thomas Lidwill the younger, the necessity of a full compliance with the restriction or condition annexed to the power in that respect;) whereas it has been clearly proved and reported by the officer, to whom that matter was referred, that the recital was wholly false or erroneous, (except as to a very small part of the lands in question;) since it was found by the officer, that at the time when the said deed of revocation was executed by Thomas Lidwill the younger, a very small part only of the lands in question was actually let agreeably to the power, and that no further or other part of the lands was then in lease.

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If it be contended that the will of Thomas Lidwill the younger was an execution of the power of revocation, it will be found liable to the same objection on account of the non-compliance with the condition or restriction annexed to the power, the lands in question not being let agreeably to that condition, for three lives, or twenty years, at the time of the execution of Thomas Lidwill's will, or of his death; and such execution by will must also, for that reason, be regarded as wholly void and inoperative; the term of twenty-three and a half years of the part of the lands, which was, at the time of executing the deed of 1782, in lease, according to the terms of the power, having expired, and that part of the lands not being, at the execution of the will, actually let in the manner required by the deed creating the power. The will recites a title to the 300 acres; the power is to appoint land of the value of 300*l*. The will, therefore, is merely an appointment of 300 acres, which he was not empowered to appoint; and Thomas Lidwill the younger must be considered as having been fully aware of the necessity of all the lands being so let, in order to render any execution of the power valid and effectual, because he had previously recognised and fully admitted the necessity of such a compliance with the requisitions of the power, by the specific introduction of the recital or statement to the effect before mentioned, in the deed of revocation of the 20th day of December, 1782.

The execution of the power of revocation, by the deed of revocation of the 20th day of Decem-

ber, 1782, being thus defective, can be considered as an effectual execution of the power, so far only as relates to that part of the lands in question, which was found by the officer, to whom the cause was referred, to be actually let agreeably to the power, at the time of the execution of the deed of revocation.

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The will of Thomas Lidwill the younger cannot be considered an effectual execution of the power, with respect to any part of the lands, because the term in that part of the lands leased in the year 1782, had then expired. Both these executions of the power must be considered as defective, and consequently void and inoperative as to the lands in question, so far as they were not under lease, according to the requisition of the power. The Appellant is clearly entitled as immediate tenant in tail in possession, under the uses of the settlement, to the lands and premises of Coologenafrian or Graffin, and the part of Clekile in the pleadings mentioned, together with the rents and profits which have accrued due thereon, from the time of the decease of Thomas Lidwill the younger.

If this were a case of mere informality in the execution of a power, the defect might be supplied in a court of equity in favour of particular objects; but the record makes no such case. The only question presented is, whether the power was legally executed. Error or mistake in the instrument creating the power or the appointment might have been rectified in equity; but no such case is alleged. The decree does not even comprise a declaration to such effect, or any thing

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which can clear up the doubts which hang over the case. The exceptions taken to the report do not indeed touch the matter of the present appeal; but that is not a material objection, for the subsequent directions are consequential, and must stand or fall with the decree. The contract between the parties to the settlement provides what lands shall be appointed, and under what circumstances. A court of equity cannot make a new contract for the parties, or strike out of the settlement a material provision. It may be thought a capricious mode of ascertaining the value of the lands; but it has the character of caution, and, at all events, it is the caprice of parties contracting, and it is not the province of a court of justice to control such caprice, if it be legal. That the lands were, in fact, of the value contemplated is immaterial, if the mode prescribed to ascertain that value has been neglected. Appointments, in a multitude of other cases, which, apparently, have been innocent variations from the power, have been held void. In this case the defect is not in form but in substance. The Court is required in this case to substitute a new power.*

For the Respondents—*Mr. Wetherell* and *Mr. Shadwell*.

The decree, if right in substance, is not bad for form. The question is, whether the direction of the power as to lands in lease is material, or a point of form.

The father had power to make a beneficial lease

* As to the restrictions, the doctrine in the case of the Earl of Montagu v. the Earl of Bath, 2 Ch. Rep. 191, was cited by Mr. Phillimore.

provided the rent was not below a certain depreciation.* Thomas Lidwill the father never having executed his power, it was indifferent whether Thomas Lidwill the younger exercised his power of leasing or not. He might have leased before he revoked; but the essential part of the power is that lands, not exceeding 300*l.* in value, should be revoked and appointed. The report finds the value. There is no excess of the power in point of value. How can it be represented that the leasing was essential? If any prejudice to the remainder-man could have arisen from the non-leasing, the omission to do so might have avoided the power; but those interested in remainder could not be injured by the omission. The value, at the date of the revocation, was always capable of being ascertained. If leases had been actually subsisting, the revocation, no doubt, must have applied to them. If a lease had been made by Thomas Lidwill the father, there would have been a tenant at an undervalue. The revocation in such case could not have extended to lands in Graffin. The power not having been executed by the father as to those lands, the revocation might extend to them. The last clause shows that the power to Thomas Lidwill the younger is absolute. If the words of the power are ambiguous, the construction ought to be favourable to the object of the power.

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* This power, it seems, extended only to lands in Graffin, and a mode was prescribed of ascertaining the yearly value of the lands to be leased under the power. It was not set forth in the printed cases; nor was the deed containing it before the House of Lords upon the hearing.—See the observation of the Lord Chancellor upon this subject, post, 124.

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We stand on the right of creditors. Thomas Lidwill had a power to appoint by will as well as by deed, and he expressly refers to the deed by the will. It is the same thing as if he had sold to a purchaser in his lifetime.

The Lord Chancellor. Do the debts cover the estate? Is there any other fund to pay debts?

For the Respondents. The debts exceed the value of the estate appointed, which is the only fund for payment. In what form an agreement or appointment is made a court of equity does not regard—a bond or any writing may operate as an appointment. By the will, the fund is given to trustees to sell and dispose in payment of debts. In the case of the *Earl of Montague v. the Earl of Bath*,* the judges intimated, that if it had been the case of creditors, purchasers, or children, they would have decided for the validity of the revocation; but it was the case of a volunteer, and that circumstance was the ground of the judgment.

The Lord Chancellor. I apprehend they will not dispute, that, if he intended to execute, it would, in that respect, operate as an appointment: but they say he has failed in the subject of the power.

For the Respondents. The remainder-man cannot be affected by this mode of appointment.

Such construction should be made upon the instrument creating and the instrument executing a power as will effectuate the intention of those creating the power, and further the objects of such power.

Upon this principle the deed of 20th December, 1782, is a due execution of the power of

* 2 Ch. Rep. 191.

revocation contained in the settlement of 14th January, 1774, so far as the estate, the subject of the power, would extend, it has been literally pursued: throughout it has been substantially executed. It appears by the officer's report, unexcepted to (in this respect), that the revoked lands at the time of the execution of the deed of 20th December, 1782, did not exceed 300*l.* a year in value. The intention of the power was to allow lands of that annual value to be revoked; and it pointed out the means of ascertaining that value by the existence of leases of a certain description; but where no such leases existed on the estate, the subject of the power, the donee of the power was not to be deprived of the benefit of the execution of the power; he was not to be driven to a formal execution of leases, so as to bring himself and the lands within the very letter of the power.

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Although the deed of the 20th of December, 1782, and the will of Thomas Lidwill should be deemed a defective execution of the power, a court of equity will supply a defective execution in favour of creditors:—and it appears that the debts reported due by Thomas Lidwill, the donee of the power, amounted to the sum of 75*l.* 17*s.* 4*d.* and that his creditors have no other fund for payment of their debts but the revoked lands, the subject of the power.

The Appellant has submitted to this view of the case, for he took no exception to the officer's report, which finds that Thomas Lidwill died seized of the revoked lands; but, on the contrary, he took several exceptions, because the

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officer did not report him to be a creditor of Thomas Lidwill on the revoked lands, a case altogether inconsistent with that which he now brings by way of appeal: and, moreover, the Appellant went into evidence before the officer, to show that the revoked lands exceeded in value, at the time of the revocation in 1782, 300*l.* a year. —He failed in making such proof; and it was satisfactorily proved by the Respondents, that the lands did not exceed 300*l.* a year in value: the officer so reported, and his report stands unimpeached in that point.

The whole power must be read together: the last clause is the key to its meaning. There it is expressed to be the true meaning and intent that Thomas Lidwill the younger should have absolute power over and property in the lands to the amount in value of 300*l.* a year. A special mode of leasing is provided,* by the deed of settlement, as to part of the estate called Graffin; but not as to other parts of the estates. They might never be under lease. No direction to lease is given, nor any mode prescribed by the instrument of contract. It is analogous to the cases of leasing powers, where it is provided that leases shall be made at the usual rent. In such cases, with respect to lands which have never been leased, and for which, consequently, there can be no usual rent, it has been held † that the power extends to such lands, if it appears to be the intention of the parties to the instrument raising the power. It can only extend to such lands by estimate or valuation; it

* See the notes, *ante*, p. 119, and *post*, 124.

† Goodtitle v. Funucan, Doug. 544.

is reduced therefore to a question of intention. In *Bagot v. Oughton*,* as Lord Mansfield said, in *Goodtitle v. Funucan*, it was evident, from the nature of the thing, that the power of a temporary owner could not extend to the letting the ancient manor house, and excluding the representatives of the family who might succeed him.

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The objection to the frame of the suit is too late; it should have been taken when a reference was decreed as to the value of the lands not leased. There has been no exception to the report on that point; nor is there any appeal against the decree which assumes that the value was the material question.

Mr. Hart in reply. The owner of property may exercise the most arbitrary and capricious will, and annex unreasonable conditions to his gifts. The Court cannot interpose a Prætorian equity.

The Lord Chancellor. The real question is, had he or not a right, by a due execution of the power, to affect the land made the subject of appointment. The true meaning and intent of the power is to be considered, and whether the condition is mere matter of form.

Lord Redesdale. The decree supposes that the power is well executed at law.

Reply. It has been argued that the generality of the latter part of the power supersedes the restrictions of the former part. The power directs that the appointment shall be of so much and such parts of the premises as shall be in possession of tenants having interests, by way of lease, for twenty years to come, or for the duration of three lives, from the date of the revocation, and that

* 1 P. W. 347; Fortescue, 332; Mod. Cas. 249, 381.

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the rent payable on the leases shall not exceed 300*l*. What is there in the clause which follows expressly rescinding this provision and condition? What is there to furnish an implication that it could be within the intent of the parties to annul this express condition? It has lately and often been regretted that courts of equity, in the cases even of meritorious objects, should have adopted the practice to supply the want of form in appointments.

The latter clause must be taken with and explained by the first. The restrictions were material to ascertain the value before it had become difficult by lapse of time. It was a security taken by making the son the first victim of any indiscreet exercise of the power.*

The Lord Chancellor, on the day after the argument, said, upon the whole, we think that the power was well applied to the subject, and that the appointment has been well executed; and, without further observation, the judgment of the Court below was affirmed.†

* In the course of the argument the *Lord Chancellor* censured the omission to furnish instruments referred to in the printed papers, observing, that the power to Lidwill the elder to grant leases contained provisions as to the mode of ascertaining the full improved yearly value at the time of making leases under the power. Those provisions were not set forth, but only alluded to in the printed cases as "therein (i. e. in the deed of "settlement) particularly mentioned," and the instrument containing that power was not before the House.

* * The rule of construction as to powers has varied materially in different ages of the law, in different courts, and with different judges. What is essential to be observed in the conditions or circumstances *prescribed* by the power is now, and, perhaps, from the nature of the subject, ever will be a matter of uncertainty, unless all discretion of the judge is taken away, and a literal observation of the power in every particular is required. The same uncertainty prevails in many similar questions of this

branch of law, as, for example, what is a valid, what an illusory appointment? What a reasonable time to be allowed for payment of rent, in a lease made under a power requiring a right of re-entry to be reserved for non-payment of rent? The cases decided on these points seem to furnish rules only for cases exactly similar. In a new case, where the appointment varies in any circumstance from the authority, whether it be a valid execution of the power, can only be matter of probable conjecture, until the opinion of some court has been pronounced upon the particular case. Every new decision upon these questions does, indeed, make an approximation to certainty; but it never will be fully attained until every variety in powers is exhausted, and it can be declared to be impossible to contrive a new condition or circumstance to accompany any power.

1820.

LIDWILL v.
HOLLAND
AND OTHERS.
May 17.

A distinction has been taken between the cases where a man has power to make leases, &c. which shall charge and encumber a third person's estate; and where the power is to dispose of a man's own estate, as upon a settlement in tail or otherwise, with power of revocation in the settlor. In the first case, it is said, such powers are to have a rigid construction; but where the power is to dispose of a man's own estate, it is to have all the favour imaginable.—See *Sayle v. Freeland*, 2 Vent. 350.

In *Comberbach*, 11, 12, (a book, indeed, of little authority,) it is said, powers of revocation are to be largely taken. This is probably to be understood of such powers, where they are reserved by the owners of the estate to themselves. In *Scrope's Case*, 10 Rep. 144, where the power was to determine existing uses and limit new ones, and the donee, (who was before owner of the estate,) covenanted upon a second marriage, to stand seized to new uses, without determining or declaring any purpose to determine the former uses, it was held a valid revocation, on the ground, that when he limited new uses, he thereby signified his purpose to determine the former uses: and a case is cited, as an authority for the decision, with the maxim, "*Non refert an quis intentionem suam declaret verbis an rebus ipsis vel factis.*"

In the case now reported, the decision seems to have been made on the ground that the intention of the donor was not transgressed in the execution of the power. The noble Lords who moved the judgment apparently considered the power to be well executed at law. The doctrine of equity, by which the defects in the execution are supplied in favour of special objects of appointment, cannot be considered as a ground of decision in this case, although the Lord Chancellor, in the course of the argument, put a question, which seemed to point to such a ground.—See and compare the observations, pp. 120 and 123.

In these questions, upon the execution of powers, the difficulty lies, and insuperable it seems, between discretion with uncertainty on the one hand, and a literal construction with intolerable hardship on the other.

SCOTLAND

APPEAL FROM THE COURT OF SESSION.

THOMAS GRAHAM, of Kinross, &c.. . *Appellant.*

PAGE KEBLE, a Lunatic, Residuary Legatee of P. K., dec. ; R. SAUN- DERS, Esq. Comm. of the said P. K.'s Estate ; and R. RATTRAY, Esq. Mandatory of the said R. SAUNDERS	}	<i>Respondents.</i>
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1820.

K. having left East-India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest and principal when received to a specific purpose, by his will appointed G., a partner in the firm, one of his executors. After the death of K., the will was proved by G. ; and the firm, acting under his authority as executor, assigned the bonds, and used in their trade the money received upon the assignments.

G. ceased to be a partner in the firm before all the bonds had been assigned.

Upon suit, by the residuary legatee of K. against G., and on appeal, it was held that he was accountable to the residuary legatee of K. for the monies received upon the bonds, with 8 *per cent.* from the time of the deposit to the dates of the respective assignments by the firm ; and with interest at 12 *per cent.* (being the current rate in Calcutta) from the time of the assignments and receipt of the monies to the date of the judgment upon appeal in the original suit ; and with interest at 5 *per cent.* upon the accumulated sum, composed of principal and interest, from the last-mentioned judgment till payment : but the cost of remittance from India, and the property-tax, were held to be charges on the fund payable.

Upon a general account subsisting between K. and the Calcutta firm, held that G., as partner and executor, was liable for the balances of account, and interest at 12 *per cent.* upon all such balances as should appear to be stated and signed by the parties : such interest to be calculated from the date of the statement and signature of the account to the time of the final judgment on appeal.

Held also that G. was not, as executor, entitled to withhold payment against the residuary legatee until an account of debts, &c. had been taken ; and that, as debtor, he was not entitled to require that executors in

England (who had also proved the will of K.) should be parties to the suit in order to give him an acquittance.

1820.

In appellate proceedings interest upon the accumulated sum of principal and interest is chargeable on the debtor from the date of a judgment in the Court of Session to the date of the judgment in the Court of Appeal, although the Respondent has obtained an inhibition against the lands of the Appellant before the date of the original judgment.

GRAHAM v.
KEBLE AND
OTHERS.

Where a matter is, by the pleadings, specifically made the subject of demand, and the judgment is general for the demandant, yet, if a particular part of the demand, as the rate of interest, was not discussed, or specifically decided in the suit, it is not *res judicata*.

PAGE KEBLE, of Calcutta, in the year 1785, deposited certain bonds, due from the East-India Company, in the hands of Messrs. Graham, Crommelin, and Mowbray, a mercantile house at Calcutta, of which the Appellant was a partner. These bonds amounting, in the whole, to 46,428 current rupees, were delivered with instructions as to their application. They were to be appropriated eventually in payment of a debt owing by Mr. Keble to the East-India Company, and which became payable in the year 1796.

1785.

Soon after making this deposit, Mr. Keble quitted India, and died on his passage to England.

By his will, which he had left in the hands of Messrs. Graham and Co. as his agents, the Appellant was named one of Mr. Keble's executors, with certain other persons in Europe. The European executors having proved the will, transmitted powers of attorney to the Appellant and his partners, authorising them to act in the affairs of Mr. Keble's estate. But in the mean time the Appellant had proved the will at Calcutta; and the house of

20th March,
1787.

1820.

GRAHAM V.
KEBLE AND
OTHERS. "

Graham, Crommelin, and Mowbray, by a letter dated the 10th of September, 1787, informed the executors in England that they had no occasion to use the power of attorney, as they could act under the authority of the Appellant as executor.

No account of the affairs of Mr. Keble was transmitted to the European executors until the 10th of March, 1791, at which time the Appellant had retired from the firm, and in the November following the house failed. Some of the bonds deposited had been indorsed away by the house, for their own accommodation, between the months of November, 1789, and October, 1790, before the Appellant had retired from the concern: the remaining bonds were disposed of in the same way soon after his retirement.*

There was also a sum due to the estate of Page Keble on a balance of account subsisting between him and the Calcutta firm.

The Respondent, Mr. Keble, as residuary legatee under the will of his father, as soon as these facts came to his knowledge, required the Appellant to account for the funds due from the house of Graham and Co. to the estate of the deceased, and, upon his refusal,† brought an action against

* The particular dates of the assignments of the bonds were not very exactly ascertained in the proofs before the House. The point is not very material, according to the view taken by the Lord Chancellor in moving the judgment.

† The same demand had, in the year 1796, been made upon the Appellant in India, and proceedings against him, in the courts of Calcutta, had been in contemplation; but, after various negotiations and transactions, a case was submitted to the Advocate General by the East-India Company, and that officer, in 1802, gave his opinion that the Appellant was not re-

him before the Court of Session in Scotland. When the action was commenced the Appellant was still resident in Bengal, but having land in Scotland was subject to the jurisdiction of the courts of that country. The summons, in the action, concluded for payment of the amount of the bonds deposited by the late Mr. Keble in the hands of the Appellant and his then partners, with interest, praying that the Court would “decern and ordain the” said Thomas Graham, Defender, to make payment “to the Pursuer of the specific sum of 4786*l.* 8*s.* 6*d.* sterling, *with interest, at the rate of 8 per cent. till the bonds were severally cancelled or endorsed away; and with interest after that period at the rate of 12 per cent. being the legal rate of interest in Bengal to the time of payment; and interest on the sum of 2426*l.* 13*s.* 8*d.* the balance of account from the 14th of February, 1788, at 12 per cent. and until payment, &c.”*

1820.

GRAHAM v.
KEBLE AND
OTHERS.

This action was commenced in December, 1803, and at the same time a diligence of inhibition was executed by the Respondent against the lands of the Appellant in Scotland. After various proceedings in the Court of Session, an interlocutor was pronounced on the 11th of March, 1808.*

sponsible. Whereupon the East-India Company enforced the payment of their debt against the estate of Page Keble, and no proceedings were taken against the Appellant until he became amenable to the jurisdiction of the Scottish courts. The facts, upon this part of the case, are omitted in the text, because, (although pressed in argument,) they do not appear to have been noticed in the reasons given for the judgment.

* The Appellant became resident in Great Britain in the year 1808.

1820.

GRAHAM v.

KEBLE AND

OTHERS.

Judgment of
the House of
Lords, 10th
Nov. 1813.

From this decree, an appeal, partly on the charge of Indian interest, was brought in the House of Lords: on hearing which, in the year 1813, the judgment was affirmed, upon the ground that the Appellant being a partner in a house of agency, where a deposit was placed in special trust, became and acted as the executor of the person by whom the deposit was made; and that having acted in that fiduciary character he could not renounce it, and elect to act under his other character of agent, that he could do no act, in respect of the estate, for which he was not answerable as executor, and could not be discharged of the trust.*

The decree thus affirmed did not ascertain the periods of the different rates of interest. It became necessary therefore to present a petition to the Court below to have the sum due ascertained. With this petition a "state of the debt" due by the Appellant was lodged, in which (*inter alia*) interest was charged at the rate of 12 *per cent.* from the different periods at which the money secured by the bonds had been received by the firm, in which the Appellant was partner, to the date of the judgment in the House of Lords, according to which calculation the debt amounted to the sum of 19,413*l.* 16*s.* 2*d.*

This petition being remitted by the Court to the Lord Ordinary, the Appellant was allowed to put in objections to the state of the debt.

The Appellant thereupon contended that the

* MSS. cases, in D. P. 1813, No. 10; and see a short report of the case up to this point in Dow's Reports, Vol. II. p. 17.

House of Lords, by their judgment, had determined that he, "having taken out a probate as executor, could not divest himself of the character of executor;" and, therefore, that he must pay off and see discharged the debts and legacies due from the estate of the late Page Keble before the amount of the residue could be ascertained: that he had a right to resist payment, or accounting to the Respondents, until he was satisfied what might be the just amount of the residuary estate of the deceased. The Respondents insisted that the House of Lords, having "affirmed the interlocutors of the Court of Session," and given judgment in terms of the conclusions of the libel, which was to make payment to the Pursuers of a certain specific sum total of principal, with interest due thereon, at certain specific rates, it was incompetent for the Court of Session now to hear the Appellant upon any point or points, save those relating to the mere accuracy, in point of computation, of the "state," exhibited with the Respondents' petition.

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OTHERS.

The Lord Ordinary, by interlocutor, of the 28th June, 1814, (having repelled the objections by a former interlocutor, and having found the Appellant liable to the costs incurred since the cause was remitted,) decerned against the Defender (Appellant) for the sum of 19,413*l.* 16*s.* 2*d.* sterling (according to the computation of the Respondent), with the interest thereof, at the rate of 5 *per cent.* from and after the term of Martinmas, 1813, and until paid.

To this judgment he adhered after several representations.

1890.

GRAHAM V.
KEBLE AND
OTHERS.

The Appellant thereupon petitioned the Court of Session (Second Division) against the judgment of the Lord Ordinary, and by the original and various reclaiming petitions, the Appellant raised the following objections:—1. That the claim to interest ought to be restricted to 8 *per cent.* to the year 1796. 2. That British interest only ought to be allowed from 1796, or, otherwise, from 1803; or, from 1806, or, at the utmost, from 1808. 3. That there ought to be no accumulation of interest. 4. That he was entitled to deduct the expense of remittance from Bengal. 5. That he was entitled to make deductions, on account of the property-tax, from 1803. The Court, by five interlocutors, affirmed the judgment of the Lord Ordinary, and over-ruled all the objections except what related to the property-tax, which the Court held the Appellant was entitled to deduct from 1808 to 1813, when the debt is accumulated, and also to deduct the property-tax from the interest of the accumulated sum from Martinmas, 1813, until payment.*

From these several interlocutors of the Lord Ordinary of the 15th and 28th June, 8th July, and 22d December, 1814, and of the Second Division of the Court of 4th July and 15th November, 1815, 13th February, 1st and 8th March, 1816, the appeal was presented.

For the Appellant—*Mr. Wetherell* and *Mr. Brougham*.

Argument for
the Appellant,
18th and 21st
of June.

1. This is not a case where a trustee has made use of the money committed to his charge; it is a

* This part of the judgment below, as the Respondent alleged, was by consent.—See p. 142.

simple breach of trust at the utmost. By the judgment of this House, in 1813, the Appellant is charged as executor: in the summons he is charged both as debtor and executor. The pleas in defence took issue upon both those points, and the Court has decided generally in the terms of the libel, embracing both the *media concludendi*. If the Appellant is charged as executor, the Respondent, suing under the qualified title of residuary legatee, is only entitled to the surplus above debts and general legacies; and before any sum can be finally awarded and paid to him under the authority of the Court, it must be ascertained that all prior claims upon the estate have been satisfied. If the Appellant is charged as a debtor only, the English executors ought to be parties in the suit in order to give a discharge. An executor only has authority to receive the debt and acquit the debtor; and even the authority of the Court could not protect the Appellant from future responsibility, if this money should be required to satisfy creditors of the estate. Considered in the double character of debtor and executor, the Appellant is equally entitled to have it ascertained that debts and legacies are discharged before he pays over any sum as a residue. This claim is not inconsistent with the decree, by which the Appellant is bound to pay, through the medium of the legal representative, what is due to the estate of Page Keble, and those having right to that estate in their order of preference.

2. As to the objection, that it is not now competent for the Appellant to object to the rates of interest, because the summons concluded speci-

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fically for those rates of interest, and the Court below has decided in terms of the libel; and that judgment having been affirmed on appeal, it is now *res judicata*, and no longer questionable; it is an objection founded in fallacy.

If that matter had been *proponed and repelled* in the cause, or *competent and omitted, in foro contradictorio*, both the policy and statutory enactments* of the law would have excluded the Appellant from further litigation. But on this point no question was raised or debated in the former proceedings, no defence was urged, and the judgment, so far as it affects the question of the rates of interest, was virtually a decree in absence, which never was held to constitute *res judicata*. The conclusion of the summons was for two distinct matters, a principal sum and interest at, &c. *to the date hereof, and in time coming till payment*. The defence was, simply, that the Appellant was not responsible, and no other question was considered, or intended to be adjudged in the cause, but that of his general liability. Where defences have been made upon one branch of a cause, and omitted as to another, no presumption can be raised against the Defender as having confessed the matter, and submitted to judgment on the point undefended and undiscussed. Such is the principle and practice upon a decree in absence, where the party has been cited, and even where he has appeared by his procurator. It is said that there has been no denial of the allegations of the summons as to interest; yet, in the petition of the 31st August, 1815, which was presented after the

* Scot's Stat. 1672, c. 19.

date of the summons, this passage is to be found :—

“ It is allowed, on all hands, that from the beginning to the end of the pleadings not a word has been said on the subject of interest.”

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OTHERS.

Moreover, if this be *res judicata*, the Court itself has invaded and disturbed its own judgment. For the original decree, in terms of the libel, was for interest at 12 *per cent. till payment*. But since the cause was remitted from this House, a new judgment has given interest, at 5 *per cent.* from November, 1813; and whereas the summons makes no conclusion for accumulation of interest, the subsequent judgment authorises accumulation to the 12th of November, 1813. The Respondents, after the judgment in 1813, did not sue execution, but proceeded before the Court to settle all the details as to interest. They have, in this and other respects, treated the matter as *res non judicata*. So has the Court below, and no cross appeal on that ground is entered. The plea of *res judicata* has been rejected, in many cases, much stronger than the present. *Millie v. Millie*,* *Young v. Mitchell*,† *Chirurgeons of Glasgow v. Reid*,‡ *Smith v. Semple*.§

A foreign rate of interest is a fact, upon which no decree can be made, without proof or express admission. Decrees must be founded upon allegation and proof. Admission of the fact cannot be implied where the question has never been

* Dict. of Dec. Tit. process, No. 318, Nov. 27, 1801.

† Id. ib. No. 320, Feb. 10, 1803.

‡ Id. ib. No. 340, Dec. 17, 1701.

§ Id. ib. No. 341, Dec. 14, 1711.

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KEBLE AND
OTHERS.

raised; at all events, not before the decree is extracted. Such implication is never made against a party unless the matter has been referred to his oath as the medium of proof, and he does not appear, and answer upon oath. Upon a verdict in an action for a promissory note interest follows incidentally by way of damages; but every claim for debt or damage does not, as a matter of course, include interest. In equity proof is required of the employment of the money. The defence, therefore, against the liability for the principal does not comprise a defence against liability for interest. Upon this point, therefore, the judgment is not conclusive against the Appellant. In moving the judgment in this House in 1813 not a word was said upon the subject of interest.

3. Indian interest is not due to the extent awarded. The Appellant has not used the funds, and the Respondents ought not to benefit, by their own delay, from 1791 to 1803. During all that time they might have sued in the courts of Bengal. The House of Graham and Co. were instructed by Page Keble to invest his money in the purchase of bonds, which were to remain in their hands until the joint bond to the Company became due, which happened in 1796. The interest upon bonds so purchased would have been 8 *per cent.* or less, and the purpose of the deposit terminated in 1796. The Appellant, therefore, is not chargeable with more than 8 *per cent.*, nor beyond 1796 at the utmost. From the year 1796, when the bonds ought to have been applied in payment to the Company, the amount became a debt, owing from one British subject to another, upon which,

by the statute against usury,* more than 5 per cent. cannot be demanded.

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OTHERS.

According to authorities in the law of Scotland, interest, above the domestic rate, is not allowed even upon foreign contracts, *Savage v. Craig*,† *Wood v. Grainger*.‡ In *Campbell v. Hannay*,§ interest was, indeed, finally given at 8 per cent. according to contract by bond; but that is a single case not applicable in its circumstances, and the authority is questionable. This is not a foreign but a British debt, not constituted by contract but by law. This distinction is recognised by the text writers: by Dirleton,|| and by Lord Kaimes.** According to these principles, if the Appellant is considered as responsible for the bonds, the interest which they bore is the proper rate. When it became a debt constituted by law, he is only liable to interest established by the law of the country where the remedy is applied. Upon the same principle it is that the law of Scottish prescription is applied to debts arising upon foreign transactions, when the party sues in the courts of Scotland.†† At all events foreign interest ought to cease, and British interest to commence either from the 13th of December, 1803, when the first step was taken in the action, or from the 14th of November, 1806, which is the date of the first decree. The Appellant, upon the first process,

* St. 12 Anne, c. 16. † Fountain-hall, vol. ii. p. 559.

‡ Fac. Coll. June 24, 1779. § Ibid. Feb. 15, 1800.

|| P. 227, *voce* process against strangers.

** B. 3, c. 8, s. 1, p. 321, citing Eq. ca. abr. c. 36, (E.) s. 1.

†† Kaimes Sel. Dec. No. 85. March 2, 1761—M'Neil. July 13, 1768—Randal. Feb. 20, 1771—Ker. Feb. 4, 1772—Barret.

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GRAHAM *v.*
KEBLE AND
OTHERS.

might have obtained security for the amount.* If the commencement of the action did not, at least the judgment of the Court, in 1806, did make it a Scotch debt, carrying Scotch interest. If that judgment should be considered as interlocutory, then the final decree by the Court of Session in 1808 ought to be the period for the computation of British interest. By the judicial proceedings in Scotland, the debt was, or might have been, secured by the Scotch law; and by the execution of the inhibitions, in 1803, against the heritable estates of the Appellant, it became a Scotch debt vested upon heritable security.

4. Foreign interest cannot be due after the year 1808, when both debtor and creditor were resident in Great Britain. Interest, at more than *5 per cent.* is forbidden by law between parties so resident. The place of the original contract, or of the transactions from which the liability arose, cannot alter the law between resident subjects. While one of the parties to the contract is absent in the foreign country, the courts here may apply the foreign law, but not after the parties become resident in this country. Could parties intending to negotiate a loan, by going to Ireland for the purpose, fabricate a bond, which, upon their return, should bear interest at *6 per cent.*? Could such a transaction be sustained upon a short residence? If so, the statutes against usury are futile.

Interest does not depend unalterably upon the original constitution of the debt, but arises from

* He did, in fact, obtain an inhibition against the lands of the Appellant, which operates as an injunction against alienation.

detention of the money due. It is an equivalent for the use of the money; and a change in the rate of interest ought to follow a change in the residence of the parties, by which the use and the remedy are regulated. While the Appellant remained in Calcutta, the place of implied contract, he might be liable to Indian interest: when he came to Great Britain the implication as to interest ceased. The Appellant then became amenable to British laws both in person and estate. He ought not to be injured by delay in the administration of justice.

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KEBLE AND
OTHERS.

Whether foreign interest can be given by the courts of Great Britain must depend on the nature of the contract and the residence of the parties, or one of them in the place of contract. Such was the case of *Bodily v. Bellamy*.* There was express contract by bond, and the Plaintiff, from the date of the obligation to the time of judgment in the action, had been resident at Calcutta. Under those circumstances the Court gave interest at 9 per cent. In *Ekins v. the East-India Company*,† foreign interest was given upon the value of a ship and cargo, because it was wrongfully taken from the agent of the owner, and the Court held that the Company (who may be considered as residents of India) had made the usual advantage of money in that country. In *Boddam v. Riley*,‡ interest was refused upon the balances of unsettled accounts of a partnership in Bombay, notwithstanding

* 2 Burr. Rep. 1094.

† 1 P. W. 395.—See the Treat. of Eq. b. 5, c. 1, s. 6, and the notes of the editor.

‡ 1 B. C. C. 239; 2 B. C. C. 2, 3; and see 4 B. P. C. 560, with the abstract preceding the report, and the note at the end.

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standing the custom of the country, stated upon affidavit, to charge and allow interest in all mercantile transactions, and upon debts in general. In that case, *Lord Thurlow* observed, "I am to say, "that although the general rule of law is otherwise, "yet, by reason of this custom, interest is to run "on a debt not carrying interest in this country, "because the original transaction was in India; "I cannot admit such a custom to control the "clear law of this country." In a former stage of the same case, *Lord Thurlow* had said, that interest was not in the discretion of the Court, and could only be given upon contract.*

In *Connor v. the Earl of Bellamont*,† Irish interest was given, because the debt, though contracted in England, was charged upon land in Ireland, and the debtor being an Irish Peer executed a bond in Ireland to secure the debt.

The neglect of the Respondent is a further reason for refusing all interest. This claim was raised against the Appellant when he was in India in 1796, and was apparently abandoned, after an opinion had been given against the claim by the Advocate General of Calcutta in 1802. The Appellant might have made arrangements to dis-

* The report, 1 B. C. C. p. 239, supposes the Lord Chancellor to say, "that *nothing* but what arises from contract or *de-mand* of debt can give rise to a demand of interest." This appears both incorrect and deficient. For a demand of debt gives no right to interest, and in equity it is always given upon *breach of trust*. If a trustee sells stock out of the public funds, the Court gives to the *cestui que* trust an option to demand against the trustee the dividends which the stock would have produced, or interest upon the proceeds of the sale.

† 2 Atk. 382.

charge or diminish the debt, if he could have anticipated that the claim would be renewed in Scotland after so great a lapse of time.

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OTHERS.

5. Compound interest ought not to have been allowed. If, as the Respondent contends, the affirmance of the judgment in this House is conclusive upon the question of interest, then there being no conclusion in the summons for accumulation of interest, the judgment, which is in terms of the libel, does not warrant accumulation.

If the judgment is not conclusive, as the Appellant contends, then it will be necessary for the Respondents to amend their libel (if that can now be permitted) before any judgment can be given for a right, which, as the summons is now framed, makes no part of the Respondents' demand. Independent of all questions of form, interest upon interest is never allowed, but upon adjudication, or a denounced horning upon an extracted decree.

6. The Appellant is entitled to deduct the cost of remittance. If this was a debt contracted, and payable in Bengal, the creditor is bound to receive it there. In *Campbell v. Hannay*,* the Court refused the debtor's cost of remittance, because he had compelled the creditor to sue in Scotland; but in this case the creditor has avoided the *forum contractus*, and selected the courts of Scotland.

7. The Appellant is also entitled to deduct the property-tax from the year 1803. The Respondent was liable to the tax, not being within the exceptions of the statutes; and the circumstance

* *Ante*, p. 136.

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that the Appellant was resident in Calcutta till 1808 is immaterial.

For the Respondents—*The Solicitor General* and *Mr. Kindersley*.

The Appellant was sued both as partner in the firm of Graham and Co. and as executor: so it appears expressly by the summons. The Respondent, suing as residuary legatee, claims a specific sum as residue against a person filling the character both of debtor and executor; and so he was charged by the judgment below, according to the allegations of the summons, and the defence made by the Appellant.

The argument † of *novatio debiti* is repelled by the fact, that the firm of Graham and Co. rejected the authority and orders of the English executors, upon the express allegation that they had the authority of the Appellant as Indian executor, and he was then also a partner of the firm.

The question, as to the rate of interest was concluded, by the judgment of this House, in 1813. For the decrees of the inferior Court were thereby affirmed, and those decrees were in the terms of the libel, by which interest, at the rates and for the periods in question, was specifically demanded. The very question was argued in the Courts below, and upon the hearing of the appeal.

* Sir Robert Gifford.

† This point was argued in the former stage of the suit. It was then contended by the Appellant, that, by the effect of the transactions between the parties, and the events which had happened, he was released; and that the new firm, after he ceased to be a partner, had been accepted and recognised as the debtors.—See the Lord Chancellor's observations in moving judgment, post, 147—S.

In order to constitute a valid judgment, it is not necessary that the question should be debated. If it be alleged on the one part, and not contradicted on the other, that is sufficient ground for the judgment.* The Appellant might have pleaded, 1. that he was not liable at all; 2. if so, that the rate of interest claimed was extravagant.

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The subsequent proceedings in the Court of Session, upon the subject of interest, were merely to ascertain the amount of the sum due by calculation, not to open and re-discuss the general question of liability for the specific rates of interest, and for the times before awarded. The allowance of interest follows as a consequence upon a judgment for the principal.

The allowances for property-tax, since the judgment in 1813, do not operate as an admission by the Respondent that the judgment was open: that was done by consent, and was a gratuitous boon to the Appellant.

If it be admitted that the question is open, this being a claim against a trustee, *ex delicto*, he is liable for the largest rate of interest which might have been made by the use of the money in the country where the breach of trust took place.† If a trustee sells out stock from the public funds, he is chargeable either with the dividends or the profits actually made, or the proceeds, with the usual

* Stair's Inst. l.

† That 12 *per cent.* is the usual rate of interest in Bengal is recognised, and it is made the legal rate there by stat. 13 Geo. III. c. 33, s. 30. It was not proved in the cause that 12 *per cent.* was actually made: that such advantage might have been had is sufficient to charge a trustee.

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rate of interest at the option of the *cestui que* trust: so even if he represents, contrary to the fact, that he has purchased stock. *Bate v. Scales*.* In these cases the Court does not consider, as the measure of damages, what would have been gained for the benefit of the *cestui que* trust, if the directions of the trust had been followed, but what has been wrongfully acquired, or might have been acquired by the trustee upon the misapplication of the trust fund. The partners of a firm, to which the Appellant belonged, have abused their trust, and the Appellant being executor has permitted that abuse. Six of the bonds were endorsed away while the Appellant was a partner in the firm, and four a year after his retirement. If he had written or endorsed upon them a statement of the purpose for which they were deposited the loss would have been prevented; but, in gross violation of his trust, he left them in the hands of a firm, which he, as a partner, could not fail to suspect of actual or approaching insolvency.

As to the objection made against the judgment for accumulated interest, it is consonant to the settled principles of law as well as equity, that interest, ascertained and decreed upon a final judgment, should be incorporated with the principal.† From that time the principal and interest

* 12 Ves. 402; and see *Harrison v. Harrison*, 2 Atk. 121; *Pocock v. Redington*, 2 B. C. C. 653, 5 Ves. 794, and *Long v. Stewart* in the note; *Treves v. Townshend*, 1 B. C. C. 384; *Newton v. Bennett*, *Perkins v. Bayntun*, 1 B. C. C. 359, 375; *Forbes v. Ross*, 2 B. C. C. 430; *Young v. Combe*, *Piety v. Stace*, 4 Ves. 101, 620; and *Tebbs v. Carpenter*, 1 Mad. Rep. 290, where the cases upon the general question are collected.

† *Bodily v. Bellamy*. *Ante*, p. 138.

become an entire sum bearing interest. The right to interest upon this aggregate sum arises from the delay of payment caused by the appeal. The accumulation, they say, is not asked by the summons; nor is it necessary. In actions upon bills of exchange interest is not demanded by the declaration; yet it is given by the judgment, or upon motion: and upon writ of error, if the judgment below is affirmed, interest is calculated, not on the principal sum for which the action was brought, but upon the whole amount recovered by the judgment below up to the time of the judgment in the Court of Error.* The result is,

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* Upon writs of error interest is given by way of damages, for which provision is made by the statutes for preventing delays in suits of law, 13 Car. 2, s. 2, c. 2, s. 8, 9, 10. The Plaintiff, upon suing his writ of error, is, by that statute, compelled to give security for *damages* as well as costs, otherwise execution may issue, without stay or supersedeas, notwithstanding the writ of error. See also, 3 Jac. 1, c. 8, made perpetual by 3 Car. 1, c. 4, s. 4, 16 and 17 Car. 2, c. 8, s. 3. Upon affirming a judgment in the Exchequer, the Chancellor personally (who, with the treasurer and judges, are, by the 31 Edw. III. constituted a court for examining erroneous judgments in the Exchequer), gives interest, computed according to the *current* (not the legal) rate, from the day of signing judgment below to the day of affirmance in that Court of Error. In the Exchequer Chamber, which is a court established by 27 Eliz. c. 8, to rectify errors in the judgments of the King's Bench, if no direction is given by the court, the officer (under the authority of 13 Car. 2, s. 2, c. 2, s. 10,) in taxing costs, allows double the money out of pocket, but gives no interest. In the King's Bench, upon writs of error from the Common Pleas, interest is usually given, by way of damages, upon the sum recovered in, and from the time of signing the judgment below until the affirmance. Bishop of London, &c. v. Lewen, 2 Strange, 931; Bodily v. Bellamy, 2 Burr. 1094. By stat. 3 Hen. 7, c. 10, upon all writs of error

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that, as long as the bonds were held by the firm, they and the Appellant as partner, trustee, or executor, are responsible for the amount of interest paid upon them, which appears to be 8 *per cent.* From the time when the bonds were assigned and converted into money, which they used, or might have used in Calcutta, and up to the date of the final judgment, the common interest of the country, which is 12 *per cent. per annum*, has been rightly charged against the Appellant; and, after the date of the final judgment, the Respondent is entitled to English interest upon the whole sum ascertained and awarded by the judgment.

The Lord Chancellor, in the course of the argument, made the following observations:—

Laying the rule of law out of the case altogether, is not this, upon the special circumstances of the case, a continuing trust?

If I intrusted a person to lay out money for me in government bonds, and if, instead of doing so, he had laid it out for himself, or for his own partnership, would he not be liable to pay

sued, in delay of execution, to reverse judgments “if they be affirmed, or the writs discontinued in default of the party, or the Plaintiffs be non-sued in the same, the Defendants in Error shall recover costs and damage, for delay and vexation, by discretion of the justice before whom the writ is sued.” This is re-enacted by 19 Hen. 7, c. 20. The Plaintiff, in the Court below, has also the option to bring an action of debt upon the judgment, in which action he may recover interest, by way of damages, for detention of the debt constituted by the judgment.

The House of Lords, in deciding appeals and writs of error, exercise a discretion as to costs and damages: to answer which, security is taken, by requiring the Appellant to enter into a recognisance, in the sum of 400*l.* before he is permitted to prosecute his appeal.

me the common rate of interest? For this reason, it becomes material to be considered whether the interest, as payable on the bonds, ought to be continued after 1791, or whether it ought to cease. It is contended, by the Appellant, that the interest, as on the bonds, ought not to cease after 1791, if a larger rate of interest is to be charged, when the interest, as on the bonds, ceases. On this point the questions to be settled are whether the former interest is to go up to 1791 only, or to 1796; and whether the larger rate of interest is to go on till 1813, or to cease in 1803; or when to commence, and when to cease. On this point there is a difference in the statements of the parties as to the facts. The Appellant states in his case that all the bonds were uplifted after he had left the partnership. The Respondent, on the other hand, in his case states, that, in respect to six of them, they were indorsed away between the months of November, 1789, and October, 1790, and that the remaining bonds were disposed of soon after the Appellant had taken leave of the concern. As a question of fact considered material in arguing this case, it may easily be ascertained, with respect to these bonds, whether they were disposed of by the partners of the house after Mr. Graham had left the concern, or whether he is to be considered as having been a partner in the house when the bonds were actually disposed of. But whether he was a partner in the house or not, he was at least bound, both on account of the residuary legatee, and on his own account, to have taken some little care that no improper use was

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made of the bonds, and to have taken that care, more especially, on account of his own character of executor.

* * * * *

There may be a great distinction to be made, in point of fact, with regard to the insolvency of the partnership, and with regard to the periods at which they took the bonds to themselves; but if I had put my money into the hands of the house of Graham and Co., while Mr. Graham was a partner in it, whether the other partners had continued solvent or not—whether they had continued in the country, or had left it, I should have looked to Mr. Graham, and should have expected to call upon him, according to the terms of the contract, to have that contract fulfilled to me.

* * * * *

The elder Page Keble died in 1786, when his son, the residuary legatee, was about five years old, since he did not attain the age of twenty-one till the year 1802. Now Mr. Thomas Graham was in a situation in which he ought to have acted both for himself and the infant.

* * * * *

Mr. Graham might have relieved and protected himself; and if he had considered the matter for a moment, he must have been convinced of his liability for interest, if there were no special circumstances in the case; and can he press special circumstances against an infant for whom he was trustee?

July 17, 1820. *The Lord Chancellor.* There was a cause heard some time ago, in which Thomas Graham was the Appellant, and Page Keble, a lunatic, and others, were Respondents.

In the year 1803 an action had been brought in Scotland against the Appellant, upon his succeeding to the estate of Kinross, in Scotland. When he became entitled to that estate, and the possession of it, he became amenable to the jurisdiction of the courts in Scotland. The action was commenced by Mr. Page Keble in the Court of Session against the Appellant, while he was resident at Calcutta, and the summons stated a variety of transactions, in which Mr. Graham, the Appellant, had been engaged with Mr. Keble, the father of the Respondent. It represented that the Appellant was a member of the house of Messrs. Grahams and Mowbray of Calcutta; that Mr. Keble, the father, before leaving India, in 1786, had executed a power of attorney in favour of that house for managing all his affairs, and uplifting the debts and the effects due to him; that besides this power of attorney, he left a letter of instructions with this firm, and a duplicate of his will in the hands of the Appellant, who was his confidential friend, and who was one of the executors named in the will; that, upon receiving accounts of the death of Page Keble, the Appellant proved his will and codicil, obtained letters of administration from the Prerogative Court of Calcutta, and had extensive intromissions with the estate and effects of the said Page Keble as executor, or as a partner of the company of Graham and Mowbray, in virtue of which, it was stated, that he was justly indebted to the pursuer (Respondent, P. K.), as residuary legatee of his father, in a great variety of sums, which are stated and set forth in the summons, and which amount to

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4768*l.* 8*s.* 6*d.* sterling, and interest thereon :

“ Therefore” (the summons concluded that) “ the
“ said Thomas Graham ought and should be de-
“ cerned and ordained, by decree of the Lords of
“ Council and Session, to make payment of the
“ principal sum of 4768*l.* 8*s.* 6*d.*, and interest
“ thereon as follows, viz. interest of the said seve-
“ ral bonds, from their respective dates, till the
“ same were paid or discharged, or indorsed away,
“ and value received therefrom, at the rate of 8
“ *per cent.*, being the rate of interest which these
“ securities bore ; and, afterwards, at the rate of
“ 12 *per cent.* of the principal sums contained in
“ the said bonds, being the ordinary rate of in-
“ terest exigible in Bengal to the date thereof,
“ and in time coming during the non-payment ;
“ and interest of the sum of 2426*l.* 13*s.* 8*d.* ru-
“ pees, the balance of the said account, from the
“ said 14th of February, 1788, at 12 *per cent.*
“ to the date hereof, and in time coming during
“ the non-payment, deducting always from the
“ said principal sums and interest all partial pay-
“ ments, which the said Defender can instruct to
“ be (have been) made, if any such there were.”

The defence against this original action was this : that, although he had taken out probate of the will, in which he was named executor, yet he did not act, he did not possess the character of executor, and did not incur any legal responsibility : and, in the next place, that, after he had ceased to be a member of the company of Grahams and Mowbray, and was by public notice separated from it, the executors in England recognised the new company as their debtors, and had

intrusted the funds to the new and not to the old company, which created, what they call in Scotland, *novatio debiti*.

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By interlocutors of 1806 and 1808 the Court of Session declare their opinion against the Appellant.

An appeal was then brought to this House, which was heard in November, 1813. Upon that appeal it was ordered and adjudged that the petition and appeal should be dismissed, and that the interlocutors therein complained of be, and the same were thereby affirmed.

After the dismissal of the appeal from this House, a petition was presented to the Lord Ordinary to apply the judgment. A great variety of proceedings appear to have taken place; and it is upon the judgments pronounced in the course of these proceedings by the Lord Ordinary and the Court of Session that this new appeal is brought, praying that these interlocutors may be reversed, and assigning several reasons which are stated.

The Appellant says he has been made liable as executor, and that he ought not to have been so made liable; and, as this action was brought against him by the residuary legatee, that it was necessary to ascertain whether all the debts and legacies had been paid before the amount due to the residuary legatee could be determined. In the next place, he objects to the rate of interest awarded, complaining that it is higher than the law authorises.

The Appellant contends also that the judgment of this House, in November, 1813, did not form a *res judicata*. As to the charge of Indian interest, he says the action was brought against him in 1803, in the Court of Session, without any intimation to

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him, when he was resident in the East Indies. Now, the Scottish courts had jurisdiction by reason of his having property in Scotland, but the debt was not contracted in Scotland but in India.

He further insists, that, supposing the Court to be right as to the mode of calculating interest, he is entitled to have the charge of remitting the money from Calcutta to England deducted, and that an allowance ought to have been made for the property-tax: that it ought to have been deducted from the interest.

In my opinion the Appellant has not a right to call on the residuary legatee for an account of all the estate and effects of the testator; I do not think there is any pretence for it.

In the next place I state, as my opinion, that the decision upon the cause in this House in 1813, did not amount to a *res judicata*, so as to fix the Appellant with a demand to the full extent of the conclusions of the summons in the Scottish court.

The next question is, how the interest ought to be calculated; and recollecting the circumstances of this case, the place where the debt was contracted, and the judgment obtained, the party will be chargeable with interest on the different bonds, according to the interest they carried, until they were paid off, or indorsed away, at the rate of 8 *per cent*. By the receipt of the money due upon these bonds, a debt was constituted as an Indian debt; and being so constituted, it must, upon principles of law, bear interest at 12 *per cent*. from the time when the bonds were paid off until it became a British debt. When this House dismissed the appeal in this cause in November,

1813, it became a British debt, and therefore from that time it can only carry British interest, that is to say, interest at 5 *per cent.*; and that interest at 5 *per cent.* is to be calculated on the sum constituted, by consolidating the principal sum, with interest at 8 *per cent.* on the different bonds from their dates till they were paid off, and 12 *per cent.* from the time when the bonds were paid till it became a British debt, and from that moment 5 *per cent.* on the aggregate, composed of this consolidated sum of principal and interest. That consolidated sum should bear interest at 5 *per cent.*

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The next question is, whether the Appellant is entitled to any thing *for remittance*. I think he will not be entitled to remittance for the whole sum due, as it will stand after it bears British interest at 5 *per cent.*, and up to the day of payment; but he will, in strictness, be entitled to the cost of remittance, on the amount of the debt, as it was estimated on the 10th of November, 1813.

The last thing which I am to consider in this case relates to the deduction of the property-tax. I think he ought to be allowed a deduction of the property-tax, between the year 1803 and the time when the property-tax ceased to exist, on all sums which he can show that he paid during that period.

What I have stated, and mean to propose as the minutes of the judgment on Wednesday, is to this effect :

With respect to the bonds, the interest on them shall be calculated at the rate *per cent.* which they respectively bore from their dates till the time when they were discharged; and the party shall be charged with 12 *per cent.* after that time till

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November, 1813, when it became a British debt. Then 5 *per cent.* only became chargeable on the consolidated sum of the former principal and interest. An allowance is to be made for remittance on the sum, principal, and interest, as it stood in November, 1813; and an allowance is also to be made for the property-tax between the year 1803 till the time when it ceased. With these findings, I shall propose to remit the parties to the Court of Session to do therein as may be just.

As to the sum which is due on the balance of an account, not being sure whether I rightly apprehend that part of the case, I shall consider whether it may be necessary to say any thing further upon it.

Minutes of
order, July 19,
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It is declared that the Appellant is to be charged with interest at the rates following, viz. with interest, at the rate of 12 *per cent.* upon the balance of any account which shall appear to have been *stated and signed*, and which is mentioned in the summons in this action, such interest to be calculated from the date of the account so stated and signed to the 10th of November, 1813; and with interest of the several bonds in the proceedings mentioned, at the rate *per cent.* which they respectively bore, until the times when they were respectively paid and discharged, or indorsed away; and value was given for the same, and with interest, at 12 *per cent.* from and after such times respectively to the 10th day of November, 1813, when the former appeal was dismissed this House. But that the Appellant is to have proper and just allowances, and deductions made, in respect of

partial payments, if any, which he can instruct to have been made, and in respect of interest thereof, and also a deduction of the charge of remittance to Great Britain of the consolidated amount of the debt which shall be constituted against him up to the said 10th of November, 1813; and it is further declared that the Appellant is chargeable with interest, at 5 *per cent.*, upon such consolidated amount of debt from the said 10th day of November, 1813, until payment thereof: but with a due deduction of the property-tax upon the amount of the interest of such consolidated amount of debt so long and at such rates as the same were chargeable upon the Appellant's property in Great Britain; and it is ordered, that, with these declarations, the cause be remitted back to the Court of Session in Scotland to do therein as is just and consistent with these declarations.*

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* Upon the questions of foreign interest and remittance, see the case of *Lansdowne v. Lansdowne*, *ante*, p. 60 et seq. and the notes to that case.

In 1 Eq. Cas. Abr. c. 36, (E.) an authority is cited, in which it is laid down generally, that, "in all cases, interest must be paid according to the law of the country where the debt was contracted, and not according to that where the debt is sued for." Instances are quoted, in which Turkish interest, although both parties had been long in England, (pl. 1,) East Indian and Irish interest, (pl. 1,) and West Indian interest, at 10 *per cent.*, (pl. 3,) were awarded by courts of equity upon contract and breach of trust. In the same place a doubt is expressed as to the accuracy of the report of *Lord Ranelagh v. Sir John Champant*, 2 Vern. 395, where it is said, upon a debt contracted in Ireland, and a bond given in England to secure it, English interest was awarded; and, in contradiction to *Vernon's Report*, it is stated that Irish interest was allowed by the Court. So the same case is stated in *Prec. in Chancery*, 108.

But as to the general doctrine that interest, *in all cases*, is regulated by the law of the place of contract, without regard to the place where the security is given, the residence of the parties, or other circumstances, *quære*, and see the cases collected in the note to the foregoing case in Mr. Raithby's edition of *Vernon*.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

JAMES Duke of ROXBURGHE, &c. *Appellant.*
 JOHN ROBERTON, late Tenant in }
 Newton of Roxburghe } *Respondent.*

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A TENANT, by a clause in his lease was bound, “ at his removal, to leave upon the land all the dung and manure of the preceding year; the value to be paid by the succeeding tenant, &c. ; and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground.”

Held, on appeal, (reversing the judgment below) that the tenant, under this contract, is not entitled to take away or sell (or semb. to have value for) the straw of the last or way-going crop, and that the lessor is entitled to have and maintain letters of suspension and interdict if the tenant threatens to sell the straw.

The custom of the country can have no operation where there is a contract with provisions applicable to the point in dispute.

IN 1790, a farm, called Newton, being parcel of the entailed estate of Roxburghe, was let by John Duke of Roxburghe for twenty-one years from that date to John Roberton, the Respondent.

In the lease there was a clause in these words :—
 “ Farther, the said John Roberton, or his fore-
 “ saids, *at their removal from the said lands*, shall
 “ be obliged to leave upon the ground all the
 “ dung and manure of the preceding year; but
 “ the value *thereof* shall be paid to them by the
 “ succeeding tenant, as the same shall be ascer-

“ tained by two neutral men, one to be chosen by
 “ each party; *and AT NO TIME shall the said John*
 “ *Roberton, or his foresaids, sell or give away any*
 “ *of the hay or straw of the said farm, which shall*
 “ *always be spent on the ground.*”

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This lease expired in 1811; but by agreement with Mr. Swinton, the judicial factor,* to whom the entailed estate of Roxburghe had been committed by authority of the Court of Session, the Respondent obtained leave to possess, until Whitsunday, 1815, on the same terms as in the lease, which was to be held as continued to that period.

In the year 18—, the Appellant established his right as heir of entail, and obtained possession of the entailed estates of Roxburghe.

The Appellant, by a written intimation from the Respondent, in August, 1815, was informed that he meant *to sell the whole straw of that crop*, unless the Appellant would take *the crop*, both corn and straw, at a valuation. The Appellant having no occasion for the corn declined this proposal, stating, that he conceived the straw could not be sold, but must be consumed or left on the farm, without valuation to be paid by the landlord; but, as the Respondent disputed that point, the Appellant proposed that the straw should be left, a valuation being put upon it, and the Appellant bound himself to pay that valuation, *in case* it should appear that the tenant was not bound to

* The right to the entailed estates of Roxburghe was under litigation, pending which a manager was appointed.

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consume or leave the straw upon the farm. This proposal was rejected by the Respondent, who threatened to sell the straw. The Appellant, thereupon, obtained letters of suspension and interdict. These letters were afterwards brought to be discussed before Lord Pitmilley, who pronounced the following interlocutor:—"The Lord Ordinary having considered the foregoing minute for the charger, with the answers thereto for the suspension, and whole process, repels the reasons of suspension, and *recals the interdict*, and decerns."

Dec. 28, 1815.
First interlocutor of the
Lord Ordinary
appealed from.

A representation against this interlocutor having been lodged, and followed by answers, his Lordship, on the 29th of February, 1816, pronounced the following interlocutor:—"The Lord Ordinary having considered this representation, with the answers thereto, and whole process, refuses the desire of the representation, and adheres to the interlocutor represented against; finds the Respondent entitled to expenses, and allows an account thereof to be given in, and to be taxed by the auditor."

Second interlocutor of the
Lord Ordinary
appealed from.

The Appellant then presented a petition to the second division of the Court of Session, on advising which the Court pronounced the following

May 30, 1816.
First interlocutor of the
Court appealed from.

interlocutor:—"The Lords having heard this petition, they adhere to the interlocutor complained of, and refuse the desire of the petition."

June 28, 1816.
Second interlocutor of the
Court appealed from.

On the 28th of June, 1816, the Appellant presented another petition to the Lords of the second division of the Court, which, on advising, their Lordships refused.

An account of the expenses incurred by the

Respondent having been put in, and taxed by the auditor of the Court, the Lord Ordinary, of this date, pronounced the following interlocutor:—

“ The Lord Ordinary approves of the auditor’s report; and, in terms thereof, modifies this account to 35*l.* 16*s.* 3*d.*; decerns for the same, and the expense of extract, and allows the decret for expenses to go out and be extracted in the name of Alexander Douglas, writer to the signet, the charger’s agent.”

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July 8, 1816.

Third interlocutor of the Lord Ordinary appealed from.

Against these several interlocutors the Duke of Roxburghe appealed to the House of Lords.

For the Appellant—*The Attorney General* and *Mr. Bligh*.

For the Respondent—*Mr. C. Warren* and *Mr. Wetherell*.

For the Respondent, it was argued, that the words did not apply to the last year of the lease; that the custom of the country, in the absence of stipulation to the contrary, gave right to the Respondent; that the straw of the last year could not be consumed on the land by the Respondent, because he was to quit at the separation of the last crop; that, as a price was, by the agreement, to be given for the dung, it was not probable the straw was to be left without recompence; that the clause, obliging the tenant to leave the hay and straw, must be limited in construction to the currency of the lease, which ceased to be binding on both parties at the same time: that the obligation, to spend hay and straw on the ground, could only apply to the period of the tenant’s possession, when he had the power of spending them; and that

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the landlord ought not to receive rent for a crop which the tenant has not reaped.

For the Appellant the argument * was to the following effect :

The words of the lease directly prohibit any sale of hay or straw, and provide that they shall be spent on the ground. The tenant is at *no time* to sell, and the straw is *always* to be spent on the ground. If the last year of the lease may be considered *a time*, or comprised in the word “always,” the clause applies to the last as much as to any other year of the lease. The custom of taking away the straw of the last crop was never general, and has been long abolished as inconsistent with good husbandry. If the custom were universal and certain, it could have no effect against express agreements. It may be true, that, according to the provisions of the lease, the straw could not be spent by the tenant—that is not contemplated by the agreement. The provision and expression is that “it shall be spent on the “ground.” Whether the Respondent did or did not receive straw at his entry is immaterial, and the fact doubtful. He had allowance in the rent, and stipulated, in other beneficial terms of the lease, for the value of the straw which he might leave at the last crop. The stipulation as to price for the dung, and the omission as to straw, creates a presumption the very opposite to that for which the Respondent contends.

The words of the lease are clear, and *in claris non est locus interpretationi*. If they were doubtful, there is strong corroboration of the Appellant's construction in the context.

* Upon the opening and in reply.

For, in the very sentence next to that immediately preceding the clause founded on by the Appellant, there is special mention of the last or way-going crop: and in the sentence immediately preceding that founded on by the Appellant, there is special mention of *a time*, viz. *the time of removal of the Respondent*. After that follows the agreement, that *at no time* shall any straw be sold, or given away, but always be spent on the ground.

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From the connexion of these sentences, it is demonstrable that the parties in the lease must, in the last sentence, have contemplated the way-going crop, and time of removal.

The interpretation of the Respondent would entitle him to accumulate straw for any number of the years of the lease, and take it away at the expiration of the term.

If a construction were to be forced upon the clause, from views of hardship, and the notion of an imperfect expression of intention, this conjectural and equitable construction could never go farther than the insertion of a clause allowing to the tenant value for the straw which he left. But that would not support the interlocutors under appeal. It would only have entitled the Respondent to a claim for value, but not to sell the straw; and therefore the suspension, at the instance of the Appellant, must have been well founded, and the reasons of suspension ought to have been sustained.*

* Upon the question whether the custom of the country was not excluded where an agreement expressed the terms of the tenancy, and whether an omission to provide by the lease for

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July 17, 1820.

The Lord Chancellor. This case arises upon a lease made between John Duke of Roxburghe and John Robertson, bearing date the 11th and 19th of February, 1790, by which it is contracted, on the part of the Duke of Roxburghe, to set for the rent, and upon the conditions therein mentioned the farm, called Newtown, with its appurtenances, for the term of twenty-one years, from and after the said John Robertson's entry, which it was thereby declared should take place at the term of Whitsunday then next, old style, with regard to the houses, grass, and pasture ground; and with regard to the arable land and corn, at the separation of the crop, 1790, from the ground. With respect to the management of the farm, the following provisions are made:—

“ John Robertson obliges himself and his heirs, “ first, to keep in grass during the tack, and, at “ the expiry thereof, one-third part at least of the “ arable lands; secondly, that, of all the land kept “ in tillage, one-fifth part at least should be in fallow or turnip yearly, and both sufficiently manured; thirdly, that whatever land should be laid

payment of a given article did not furnish a presumption that no payment for that article was intended, where payment for other articles was provided for by the lease, the case of *Webb v. Plummer* was cited. In that case, by the custom of the country, the outgoing tenant was entitled to an allowance for foldage from the incoming tenant. The lease specified certain payments to be made by the incoming to the outgoing tenant at the time of quitting the premises, among which there was not included any payment for foldage. It was held that the terms of the lease excluded the custom, and that the outgoing tenant was not entitled to any allowance in respect of foldage. 2 B. and A. 746.

“ down in grass should be sufficiently sown with
 “ sound grass seeds for the fallow crop ; fourthly
 “ that during the last year of the tack, one-fifth part
 “ at least of the lands in tillage should be left in
 “ one or two brakes for the incoming tenant to
 “ fallow ; fifthly, that John Robertson and his
 “ aforesaid should give the due changes of seed,
 “ that is to say, they shall not sow wheat after
 “ wheat, nor wheat after rye or oats ; nor oats
 “ after wheat or rye, nor oats after oats ; neither
 “ shall they sow more wheat on the land, in any
 “ one year of the three ~~last~~ years of the tack,
 “ than what they have been in the practice of
 “ sowing annually during the preceding years of
 “ the tack.”

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And it was further covenanted between the parties that no “ meadow ground, on any part of the
 “ lands thereby set, should ever be fallowed or riven
 “ out, but always kept in grass ; and that no turfs
 “ or divots should be cast on any part of the land,
 “ which, on no pretence, should be pared or
 “ burnt.”

Then follows this provision :—

“ Whereas the rent hereinbefore covenanted was
 “ specially ascertained and agreed upon between
 “ the parties, and in the view and upon the con-
 “ dition that the lands should be managed, cropped,
 “ and cultivated after the method, and according
 “ to the rotation specially above set forth ; there-
 “ fore, in case the said John Robertson shall, during
 “ the currency of the tack, depart from the method
 “ of labour or rotation before described, without
 “ leave in writing given by the said noble Duke or

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“ his chamberlain ; in that case, John Robertson
 “ obliges himself, &c. to pay, &c. 3*l*. sterling ad-
 “ ditional rent yearly for each English acre so dif-
 “ ferently cultivated contrary to the covenant,
 “ and that the lessor, notwithstanding this pro-
 “ vision for additional rent, should have power to
 “ prevent such cultivation.”

And it was thereby specially provided and de-
 clared

“ That the proprietor or incoming tenant should
 “ have power and liberty to sow grass seeds, in due
 “ time, upon any part of the corn lands of the said
 “ farm, with the *last or way-going crop*, and that
 “ without any allowance to be made to the outgoing
 “ tenant for the same ; and that John Robertson,
 “ &c. at the removal from the said lands, should
 “ leave upon the ground all the dung and ma-
 “ nure of the preceding year, but that the value
 “ thereof should be paid, &c. by the succeeding
 “ tenant, as the same should be ascertained by
 “ two neutral men, one to be chosen by each
 “ party ; and at no time shall the said John Ro-
 “ bertson or his foresaids sell or give away any of
 “ the hay or straw of the said farm, which shall
 “ always be spent on the ground. And in case
 “ the said John Robertson or his foresaids shall
 “ not remove from the said lands, at the said term
 “ of expiry hereof, but shall continue to possess
 “ by tacit relocation, or by any other title, or
 “ under any pretence, other than a new agree-
 “ ment in writing, then it is hereby stipulated and
 “ agreed, that, as long as the said John Robertson
 “ or his foresaids shall continue to possess, they

" shall be holden and obliged to pay to the said
 " noble Duke or his foresaids a yearly rent of ^{1820.}
 " 450*l.* sterling in place of the said rent of 225*l.*, ^{ROXBURGHE}
 " and that besides performing and fulfilling the ^{v. ROBERTON.}
 " whole other conditions and prestations hereby
 " incumbent on them."

Out of this instrument arises the question upon which the House is now to give judgment.

The tenant relies upon the provision expressed that the dung and manure is to be left upon the ground, and paid for according to a valuation; but that, as to the hay and straw, it is not to be left or paid for. The absence of any such provision (according to his argument) shows that the tenant was to be at liberty to carry and take away, at the expiration of the lease, the hay and straw of the last year: ~~that~~ the prohibition extends only to selling or giving away; and, as to the expression, which provides that the hay and straw shall be always spent on the ground, it is to be construed as applicable only to the currency of the lease, and not to an act which takes place at or after its termination.

It is moreover contended, on his behalf, that, as he or those in whose right he stands, upon their accession to the farm, received no hay or straw, which was taken away by the preceding tenant, he will receive no consideration for those articles unless he is permitted to take them away. But this is an argument which cannot be admitted to have weight against the expressions, or to affect the fair construction of the instrument which ascertains the rights of the parties. Sup-

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posing all the facts to have been proved, which ought to form the ground of such an argument, the law requires us to presume a consideration for this sacrifice, on the part of the tenant, in the nature and conditions of the contract, and the amount of the rent to be paid by him. He binds himself by express obligation; and it must be inferred and implied, that, in his contract, he stipulated for some equivalent benefit. In the case of a reciprocal contract such as this, a party cannot be admitted to say that he has no consideration for a sacrifice which he binds himself to make. When a tenant is making such a bargain, is it probable that he should forget his interest so far as not to provide, in the other conditions of the lease, a consideration for what he gives up to the landlord?

The dung and manure is to be left on the ground and paid for. An inference from that provision is drawn, that what, according to the expressions of the contract the tenant is not bound to leave, he may carry away. But that is not a conclusive argument, because it is necessary to attend to the further provisions of the lease. Nothing is said as to any payment for hay and straw; and the clause which provides what shall be done at the *removal*, that is, the expiration of the lease, stipulates that the hay and straw of the farm "*shall always be spent on the ground,*" not that *the tenant* shall spend it, an expression which might possibly lead to a different construction. The provision that the tenant shall at "*no time*" sell or give away the hay or straw is absolutely

incompatible with the supposition of a right in the tenant, in any manner, to eloin those articles during the last year, if, indeed, the express words of the instrument leave us at liberty to enter into conjectures as to any intention to except the last year of the lease.

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The case put for the Appellant, of an accumulation of hay and corn during three years or more, which might be found upon the farm during the last year, shows the consequence to which the argument for the Respondent would lead. The manure is collected and prepared by the labour of the tenant, but hay and straw are almost the spontaneous growth of the land. It might be reasonable, therefore, that such a difference, as we find in this contract, should be made as to those respective articles.

The tenant, in this lease, was to enter upon the arable lands at the separation of the crop, and to quit at the corresponding period. In such a case, where no special provision is made by contract, the law of custom may qualify the right of the incoming tenant, and give to the outgoing tenant certain privileges, as the right to enter, for the purpose of thrashing, after the expiration of his lease. That is a question, upon the customary law of Scotland, which it is not necessary that we should deal with in this case.* Assuming or admitting the existence of such law founded on custom, we have here to construe a written contract; and, if the Scotch law is to be administered on the same principles as English law, or any law

* See note next page.

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founded on principle, we must hold that the engagements of parties to each other, by the express stipulations of a written instrument, exclude all consideration of the custom of the country.

Resting upon such principles for the direction of our judgment, can we hold that the words "at no time shall sell or give away the hay and straw, "but that the same shall always be spent on the "ground," are consistent with a right in the tenant to collect hay and straw during the last year, or any preceding years, and to carry away what he has collected at the expiration of the tenancy.

Judgment reversed.

July 17, 1820. It is declared that the Respondent, according to the true intent and construction of the tack, is not entitled to sell or give away any of the hay or straw upon the farm at any time during the continuance of the tack, or upon the same at the time of the expiry of the tack. And it is ordered, that, with this declaration, the cause be remitted back to the Court of Session to review the interlocutors complained of, and further to do in the cause as is just and consistent with this declaration.

[For the principles of interpretation to be applied to contracts and statutes, see Ersk. B. 3, tit. 3, s. 87, B. 1, tit. 1, s. 54 and 56; and, for the law as to the right of the tenant to the straw of the way-going crop, by custom and the common law of Scotland, with the exceptions to the rule, see Bell on Leases, pp. 265 et seq.]

IRELAND,

APPEAL FROM THE COURT OF EXCHEQUER.

SIR JOHN CHARLES HAMILTON, ^{*}BART. *Appellant*;
 JOSEPH HOUGHTON - - - *Respondent*.

WHERE a trust is created by deed for the payment of debts; if a bill is filed by one of the creditors to enforce the payment of his debt; that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities.

A decree for payment of the debt of one creditor, under a deed of trust, which provides for the payment of other creditors is erroneous.—So if the bill, stating *A.* to have been the survivor of the trustees named in the deed, makes the heir of *A.* a party to the suit, as such supposed survivor, and that allegation proves to be false, the decree made upon such state of the pleadings is erroneous.

A bill to carry such a decree into execution, notwithstanding long acquiescence, cannot be sustained. The original decree may be examined, impeached and varied in a suit to carry that decree into execution. It is not conclusive until reversed by original bill, or bill of review, for error apparent on the face of the decree, and the court may refuse to carry it into execution.

A decree, to carry into execution an erroneous decree, being reversed; the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree; as between the plaintiff creditor, and the debtor there is no presump-

tion from lapse of time in such a case, and upon such state of the pleadings that the debt has been paid. But other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question.

A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person.

Interest ought not to be computed from the date of the decree for payment, but from the day when payment is by the decree directed to be made.

An erroneous decree, directing payment of interest cannot give the right to interest; but interest may be due under circumstances.

A party who files a bill in a court of equity to have the benefit of a former decree, must shew (if the case requires it) that such former decree was right. If a decree appears to be erroneous, it cannot be carried into execution.

A decree taken *pro confesso* is the decree of the plaintiff who takes it, and it is his duty to see that it is right.

A decree taken *pro confesso* against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the party claiming under the plaintiff in the suit can have no benefit of that decree, if erroneous.

A bill taken *pro confesso* is conclusive against the defendant only as to the facts within his knowledge; not as to facts which the plaintiff has the same opportunity of knowing as the defendant, *e. g.* as to the survivorship of a trustee, which was alleged in the bill but proved to be contrary to the fact.

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THIS was an appeal, on various grounds, from a decree of the Court of Exchequer (Equity side) in Ireland. The following are the facts of the case, shortly abstracted from the pleadings in the Court below.

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Indentures of
lease and re-
lease, dated
12th and 13th
May 1758.

By indenture of release, bearing date the 13th of May 1758, and made between William Hamilton * and John Hamilton, his eldest son (afterwards Sir John Stewart Hamilton, baronet,) of the first part ; the Bishop of Limerick, William Scott, Henry Hamilton, and Galbraith Lowry, of the second part ; and Redmond Keane, of the third part ; certain hereditaments and premises therein mentioned were conveyed to the parties of the second part, and their heirs, upon trust, that they or the survivor of them, his or their heirs, should, by sale, &c. discharge the debts and incumbrances mentioned in the schedule to the release annexed, together with all interest then due thereon respectively.

Robert Carson was one of the creditors named in the schedule, and opposite to his name is written the sum of 350*l*. Upon the several debts contained in the schedule, which carried interest, being debts by mortgage, judgment, &c. the interest was computed, and the word "*interest*" was written under them ; but the word "*interest*" was not written under the debt of Robert Carson, and no interest was computed on his debt.

William Hamilton died intestate before the 5th day of January 1778, when *Sir John Stewart Hamilton*† became entitled to the premises comprised in the release ; and also obtained letters of administration of the personal estate of his father.

* It appears that William Hamilton was tenant for life of the estates conveyed in trust, and John Hamilton was owner of the inheritance in remainder. See p. 184.

† In the printed cases his title is stated as *heir at law* to William Hamilton ; but probably it accrued under the limitations of a will or settlement.

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Bill filed,
5 Jan. 1778.

On the 5th of January 1778, Robert Carson filed a bill in the Court of Exchequer in Ireland, against Sir John Stewart Hamilton, James Scott, as the heir at law of William Scott, (in the bill stated to be the survivor of the trustees named in the release), and others *. The bill stated, that Robert Carson had been employed for several years before the month of May 1758, by William Hamilton, as attorney and solicitor in several causes; that for the prosecution and defence thereof, after making all fair allowances, there remained due to Robert Carson 400 *l.* for money laid out and expended, and for his fees as an attorney or solicitor, and that William Hamilton being so indebted to him, and at the same time owing several other debts, did, with Sir John Stewart Hamilton, execute such indenture of release as before mentioned; and the bill prayed, that an account might be taken of what was due to Robert Carson, for principal, interest and costs, in respect to the said sum of 400 *l.* and also what was due to *the other creditors* of the said William Hamilton, who should come in and contribute to the expenses of the suit, and that the lands and premises mentioned in the deed of release, or a competent part thereof, might be sold for payment of such demands.

Death of Robert Carson,
and revivor.

Robert Carson died, and his executors, filed a bill of revivor; but Sir John Stewart Hamilton having been served with process, and not appearing to the original bill and bill of revivor, process of contempt to sequestration was entered up against him, for want of appearance and answer.

* See the statement, p. 173; and the observations of the Lord Chancellor, p. 185. The statement in the text is from the printed cases.

On the 26th day of February 1779, the cause came on to be heard on sequestration as against Sir John Stewart Hamilton, and *on bill and answer*, as against *the other defendants* *, when it was decreed that the bill should be taken as confessed against Sir John Stewart Hamilton, and that the Remembrancer should state an account of what was due to the executors of Robert Carson, *on the foot of the deed of the 13th of May 1758, for principal, interest and costs, and also on the sum of 50*l.* in the pleadings mentioned.

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v.
HOUGHTON.Decree,
26 Feb. 1779.

In pursuance of the decree, the Remembrancer made his report, bearing date the 15th day of September 1779, whereby he certified that there was due to the executors of Robert Carson, for principal and interest on the foot of the deed of the 13th May 1758, and of the said sum of 50*l.*, 835*l.* 5*s.*

Report,
15 Sept. 1779.

This report was afterwards confirmed.

On the 23d day of February 1780, the cause came on to be heard for further directions, when it was ordered and decreed, that the Remembrancer should take an account of interest on the principal sum of 350*l.* from the 3d day of December then last, to which time interest had been computed, to the 31st day of January then last, being the time when the report was confirmed, which (being computed) amounted in the whole to the sum of 855*l.* 19*s.* 6*d.*; and it was further ordered and decreed, that Sir John Stewart Hamilton should, in three calendar

Decree on fur-
ther directions,
23 Feb. 1780.

* This is so stated in the respondent's case, and in this respect, the observations of the Lord Chancellor, p. 185, seem to point to this passage; but in other respects, they are more applicable to the subsequent suit to carry the decree into execution.

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months, pay such sum to the executors of Robert Carson, with interest from the 31st day of January then last, until paid with the costs of the suit, or in default thereof, that the Remembrancer should sell the premises comprised in the deed of the 13th day of May 1758, and that out of the money arising by such sale, the plaintiffs should be paid the principal money, interest and costs.

Assignment
of decree
1785, 1796.

In the year 1785, the executors of Robert Carson, assigned the claim under the decree to George Gordon Carson, who, by a deed executed in 1796, assigned to John Potter.

Bill to carry
the decree into
execution,
31 May 1800.

On the 31st of May 1800, John Potter filed a bill in the Court of Exchequer against Sir John Stewart Hamilton and others, stating the facts before mentioned, and also that Sir John Stewart Hamilton having been served with an attested copy of the decree in the former suit, and the principal money and interest not having been paid, the hereditaments and premises comprised in the deed of the 13th of May 1758, were, in the month of June 1780, put up to sale, and purchased by one Arthur Hawthorne, in trust for the plaintiffs in that suit, for the sum of 1,000*l.* and that such sale was absolutely confirmed, but that the same was never completed by Arthur Hawthorne, because immediately after the sale, Sir John Stewart Hamilton requested the executors of Robert Carson not to suffer the purchase to be completed, promising that he would shortly pay to them the full amount of the sum so decreed, with interest, and all costs attending the same; whereupon the executors, and George Gordon Carson, assented to postpone the completion of

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the sale, in order to give time for payment. The bill further stated, that Sir John Stewart Hamilton having, after the pronouncing of the decree, become greatly embarrassed in his circumstances, took upon himself to *execute* several *deeds of mortgage* of the lands comprised in the decree, whereby John Potter had been obstructed in establishing his rights under the decree; and the bill prayed, that Sir John Stewart Hamilton might be compelled to come to account with the plaintiff, on the foot of the decree, and to pay him what should appear to be due on the foot of such account, for principal, interest and costs, and that the decree might be carried into execution and confirmed.

Before any further proceedings were had in the cause, John Potter and Sir John Stewart Hamilton died, *and the appellant, upon the death of Sir John Stewart Hamilton*, (according to the allegations of the appellant's case,) *as his only son and heir at law**, *became entitled to the hereditaments and premises comprised in the deed of the 13th May 1758.*

Death of
plaintiff and
Sir J. S. H.

On the 12th of June 1802, the respondent, who is the executor of John Potter, filed a bill of revivor against the appellant as the heir at law † of Sir John Stewart Hamilton, and the cause was duly revived.

Revivor,
12 June 1802.

* Upon this statement the Lord Chancellor observed, that there was some inaccuracy in the statement of the printed cases, as to the manner in which the appellant became entitled; and that these inaccuracies occurred so often in the Irish appeal cases, that the House of Lords was always in a state of uncertainty as to matters which might form the grounds of their judgment.

† Probably as issue in tail, or remainder man, under a will or settlement. As the case does not turn upon the fact, it is not material to pursue this inquiry; and this observation may be applied to other points of this case.

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On the 29th of May 1806, the appellant put in his answer to the original bill, and bill of revivor, insisting that Robert Carson was not entitled to interest on the sum of 350*l.* or to the sum of 50*l.* which he claimed upon an allegation (not admitted) of a parol promise made by William Hamilton, who died seventeen years before the decree was pronounced; that Henry Hamilton, one of the trustees named in the deed of the 13th May 1758, was alive at the time when the decree was pronounced, and lived several years afterwards, and that although he was the surviving trustee named in the deed, he was not made a party to the original suit; that the decree had not been prosecuted for more than twenty years after the same had been pronounced, and the appellant, by the answer, farther insisted upon the statute made in Ireland for the limitations of suits; and prayed the same benefit as if he had pleaded the statute.

Amended bill,
3 Feb. 1807.

On the 3d day of February 1807, the respondent filed an amended bill against the appellant, stating admissions and acknowledgments by letters and conduct on the part of Sir John Stewart Hamilton, of the fairness of the decree, and the validity of the demand against him, especially as to the interest, and containing allegations of various other facts not material to be stated.

Answer,
5 Dec. 1808.

On the 5th day of December 1808, the appellant filed his answer to the amended bill, representing that the admissions and acknowledgments set forth in the bill might be as therein alleged, but were owing to the negligence and indolence of his father, Sir John Stewart Hamilton, and his consequent ignorance of the facts of the case.

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Evidence.

The answer of the appellant having been replied to, witnesses were examined on the part of the respondent, who proved the exhibits, consisting of the deeds in the pleadings mentioned, some letters of Sir John Stewart Hamilton, and a draft, or order, dated the 2d day of June 1781, drawn by Sir John Stewart Hamilton on Francis Vesey, esq. in favour of one of the executors of Robert Carson for 300*l.* &c.

The witnesses on the part of the appellant proved that Sir John Stewart Hamilton was a man of indolent disposition, inattentive to his own concerns, and totally unacquainted with business; that Henry Hamilton, afterwards Sir Henry Hamilton, bart. was the survivor of the trustees named in the deed of the 13th day of May 1758, and that he was living at the time when Robert Carson filed the bill against Sir John Stewart Hamilton.

The cause came on to be heard in the Court of Exchequer, upon the 14th of February 1812, when it was decreed that the respondent was entitled to the sum of 350*l.* in the pleadings mentioned, without interest, and that the appellant should, within three calendar months, to be computed from the day of the date of the decree, pay to the respondent, as executor of John Potter, the sum of 350*l.* with legal interest from that day until paid, together with his costs to be taxed by the proper officer, or that in default of payment, the Remembrancer should sell the lands and premises therein mentioned, or a competent part thereof, and that out of the money arising from such sale, the respondent should be paid his principal, interest and costs, and that if any overplus should remain, the same should be paid to the appellant, or such person as should appear entitled

Decree,
14 Feb. 1812.

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Decree on
re-hearing,
26 June 1812.

thereto, upon the making out a good title to the purchaser.

By an order dated on the 21st of February 1812, and made upon the petition of the respondent, it was ordered that the cause should be re-heard, and the cause came on to be re-heard on the 26th day of June 1812, when it was declared that the respondent was entitled to the benefit of the decree pronounced in the cause of *Carson v. Hamilton*, on the 23d day of February 1780, and that the same should be carried into specific execution, save only so far as related to the sum of 50*l.* therein mentioned; and that the Remembrancer should take an account of what was due to the respondent, as the executor of John Potter, on the foot of the decree of the 23d of February 1780, for principal, interest and costs, deducting therefrom the principal sum of 50*l.*

Report,
6 June 1813.

In pursuance of the decree, upon re-hearing, the Remembrancer made his report, bearing date the 6th day of June 1813, whereby he certified, that there was due to the respondent, as executor of John Potter, on the foot of the decree of the 23d Feb. 1780, for principal, deducting the sum of 50 *l.* - - - - - *£.* 805 19 6

For interest on 805*l.* 19*s.* 6*d.* from

the 23d February 1780, to 23d June

1813, being thirty-three years and

four months - - - - - 1,611 19 4

For costs of obtaining decree - - - 91 15 6

Ditto of defendants, *Scott and Emery*,

parties thereto - - - - - 15 13 4

Total - - - *£.* 2,525 7 8

This report was confirmed, and on the 20th of November 1813, the cause came on to be heard upon further directions, when it was ordered and decreed, that the register should compute interest upon the sum of 805*l.* 19*s.* 6*d.* due to the respondent, as executor of John Potter, from the 23d day of June 1813, being the time to which interest was computed thereon by the report to the 20th day of November; which he having done in court, and the same amounting to the sum of 20*l.* 3*s.* and which being added to the sum of 2,525*l.* 7*s.* 8*d.* reported due, amounted in the whole to the sum of 2,545*l.* 10*s.* 8*d.* it was further ordered and decreed, that the appellant or such other of the defendants as ought so to do, should, within three calendar months, pay to the respondent, the sum of 2,545*l.* 10*s.* 8*d.* with interest from the 20th day of November until paid, together with the costs of the respondent and the said other defendants, or in default thereof, that the appellant should be barred and for ever foreclosed of and from all right and equity of redemption in and to the lands and premises in the pleadings mentioned; and that the Chief Remembrancer of the court, or his deputy, should set up and sell to the public, and to the highest bidder, the said lands and premises, or a competent part thereof; and that out of the money arising by such sale, the respondent should be paid the sum of 2,545*l.* 10*s.* 8*d.* so due to him, as executor of John Potter, with interest and costs, and that the remainder (if any) of the money to arise by such sale should be disposed of as the court

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HOUGHTON.

Decree on
further direc-
tions,
20 Nov. 1813.

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should thereafter think fit to direct; and that the other defendants in the cause should recover their costs from the respondent, and the respondent should recover the same, together with his own costs out of the monies to arise by such sale.

The appeal was brought to reverse or vary the decrees and decretal order of the 14th day of February 1812, 26th day of June 1812, and of the 20th day of November 1813.

For the Appellant, *Mr. Wetherell* and *Mr. Treslove*.

The decree of the 23d day of February 1780, was made in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, baronet, who was the surviving trustee named in the deed of the 13th day of May 1758, and was then living, and was therefore a necessary party to that suit.

Even assuming the said decree of the 23d day of February 1780, to be valid, yet, twenty-three years having elapsed before steps taken in prosecution thereof, the respondent was barred from recovering the money certified to be due by the report made in the cause of *Carson v. Hamilton*; or the same ought, at the time, when the said John Potter filed his bill of complaint against Sir John Stewart Hamilton, to have been presumed to have been satisfied.

The debt of 350*l.* due from William Hamilton to Robert Carson, was a simple contract debt, and no interest is provided in respect of that debt by the deed. There was no evidence of any contract to pay

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HOUGHTON.

interest. A debt by simple contract is not made special, because the creditor signs a deed of trust, which provides for the payment of that, with other debts bearing interest by contract. That was supposed to have been the opinion of Lord Hardwicke, from the report of the case of *Carr v. Lord Burlington*, 1 P. W. 229. But it appears from the decree, as given in the notes of Mr. Cox, that Lord Hardwicke in that case, made an order, referring it to the Master to compute interest on such of the debts as in their nature bore interest; and the case of *Barwell v. Parker*, 2 Ves. 363, shows that such doctrine was never intended to be understood as a general proposition of law.

The Lord Chancellor :—That will depend upon the language of the deed. If there be debts with and debts without interest, and the words are general, it must be construed *reddendo singula singulis*. In decrees, the language is guarded with that special view. The Master is directed to compute interest on such of the debts as bear interest.

For the appellant :—

There is nothing in the provisions of the deed which shows an intention to give interest, on the contrary, the word “interest,” which is subjoined to the specialty debts, is not set opposite to this and other debts by simple contract. In the case of a will, providing for the payment of interest upon debts, it was held not to extend to debts by simple contract, *Tait v. Lord Northwick*, 4 Ves. 618. The same construction has prevailed as to arrears of annuities, *Creuze v. Hunter*, 2 Ves. jun. 157. 4 B. C. c. 316*.

* See also *Anderson v. Dwyer*, 1 S. & L. 301.

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Upon a judgment at law, interest is only given upon the new suit. Here the original decree was erroneous and defective for want of parties, and the assignee cannot have the benefit of such a decree. When a suit is instituted to carry a decree into execution, the court "sometimes consider the directions, and varies them in case of a mistake, and "it has, on circumstances, refused to enforce the "decree," Mitf. 75*. Upon this principle the decree was varied on re-hearing in the Court below.

The sum of 805*l.* 19*s.* 6*d.* upon which the decree of the 26th of June 1812, directs interest to be calculated from the 23d day of February 1780, the date of the decree in the cause of "Carson against Hamilton," was in part composed and made up of accumulations of interest upon the original debt of 350*l.* If the respondent is entitled to interest upon the original debt, he is not entitled to interest upon the aggregate of interest and principal.

For the Respondents, *Mr. Hart* and *Mr. Raithby*.

The decree of 13th February 1780, is binding and conclusive on all parties, until reversed by original bill or bill of review for fraud, or error apparent on the face of the decree, and the appellant, claiming as heir at law, is equally bound by the decree as Sir John Stewart Hamilton, his father, and estopped from averring any matter *dehors* the decree, because the decrees of the 14th February 1812, the 26th June 1812, and the 20th November 1813, are decrees

* See the note, and the *Attorney General v. Day*, 1 Ves. 218; *West v. Skip*, Id. 244; *Johnson v. Northey*, Prec. in Chan. 134.

founded on a suit filed merely to revive and carry into execution the decree of the 13th February 1780, which has never been disputed. In bills to carry decrees into execution, the law of the decree ought not to be examined into, or the decree varied, and especially in this case, where the appellant's father, during his whole life, and the appellant himself, have acquiesced in, and submitted to the decree.

Supposing, but not admitting, that the appellant had a right to unravel the decree, as to the question of interest on the principal sum of 350 *l.* the decree is well warranted by the contract of the parties themselves, evidenced by the deed of the 13th of May 1758, whereby the lands and premises therein mentioned are conveyed to trustees, to pay thereout, by sale or mortgage, the sum of 350 *l.* with the other debts mentioned in the schedule annexed to that deed, with the interest due on the debts, and, in the mean time, to apply so much of the rents and profits of the premises as would satisfy the accruing interest. Even without any express direction as to the interest, whenever a trust deed is executed for payment of debts, and a schedule made of such debts, the simple contract debts are then in the nature of specialties, and a specific interest given in the fund out of which payment is to be made.

The case of a trust by deed is distinguished in the case of *Barwell v. Parker*, from a trust by will for the payment of debts by simple contract, which are not thereby converted into debts by specialty. In the latter case, it is the voluntary

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act of the testator; in the former, the debts are charged on the land by contract, and the remedy of the creditor by legal process, is stayed for the benefit of the debtor. The doctrine of Lord Hardwicke, in *Barnwell v. Parker*, is recognized and adopted in *Shirley v. Lord Ferrers*, 1 B. C. C. 41. With respect to the construction of the deed, it is said, that interest is computed and charged on the specialty debts, and is omitted as to this and other debts by simple contract. It is not probable that any of the creditors would give up their legal remedy without securing their right to interest.

Lord Redesdale :—The nature of the deed must be observed. It is not one by which the debtor alone charged the estate. He was only tenant for life. The charge was made by the concurrence of the son, who was the owner of the inheritance. There is a clause in the deed to indemnify the son, and that extends only to the principal of the debt *. The decree is at all events erroneous, being made in the absence of the person having the legal estate.

For the respondents :—There is an admission, by inference, from the answer of the appellant, that Scott was the surviving trustee. And where a bill is taken *pro confesso*, the facts stated are conclusive against the defendant.

Lord Redesdale :—Only as to those facts which are in his knowledge. If you take a decree against

* This does not appear by the cases. The deed is not printed either in the body of the cases or in the appendix.

a person having no interest, what operation can it have? The decree is moreover erroneous, because it directs no enquiry as to the debts owing and payable under the trust, such enquiry should have been directed, and that the debts should be paid according to their priority.

The Lord Chancellor :—The decree does not direct that the scheduled creditors should be called in. If the charges in the bill, that the trustees entered and received the rents, but did not pay, are to be taken as true; the suit is defective for want of parties. The representatives of the tenant for life should have been before the Court *. He was bound to keep down the interest of the debts until the execution of the trusts.

In the subsequent decree nothing is said of the mortgagees or other parties mentioned in the bill. The respondent states in his case, that the cause, as against all the other parties, was set down on bill and answer †. Should not the Court have made some deliverance as to those other defendants? The subsequent incumbrancers raise questions, which they had a right to have decided. How far can the decree be considered as valid against them? In the decree of 1813, as stated in the case, it is only directed, that the appellant, or such other of the defendants as ought so to do, should pay, &c. or otherwise, the premises should be sold. This is a defect in the decree. But the parties interested do not appeal.

Lord Redesdale :—It seems that the decree on rehearing does not order a sale of all the estates, or

* See p. 171.

† See p. 173.

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do more than direct that the plaintiff shall have the benefit of the former decree.

In reply :—Lord Hardwicke, in *Creuze v. Hunter*, does not decide what precise species of deed shall be sufficient to convert a debt by simple contract into specialty. As to *Shirley v. Lord Ferrers*, it is an authority in favour of the appellant.

The mere direction by deed to pay debts, does not infer either contract or trust to pay interest upon debts by simple contract.

Where creditors do not execute a deed, there is nothing to prevent their suing the debtor. They do not contract for specialty, and no consideration is given to the debtor by charging the land and discharging the person.

Practice in Ireland, where where money is not paid according to an order of Court, to give interest from the date of the order.

The *Lord Chancellor* :—The decree in that case, at least, is not adverse. The mere direction by deed to pay a debt, does not infer either contract or trust to pay interest upon debts by simple contract. As to contract, the creditors did not execute the deed. There was nothing to prevent their suing the debtor after the execution. They did not contract for specialty, and no consideration was given to the debtor by charging the land and discharging the person. The debt, after the deed was executed, remained as before, a debt by simple contract.

Lord Redesdale :—It is the practice in Ireland, where the Court orders money to be paid, and it is not paid, to give interest from the date of the order. But the great difficulty is, that the decree is erroneous for want of proper parties to the suit, and proper directions in the decree.

Mr. Hart :—There is no appeal against the original decree.

The *Lord Chancellor* :—That brings it to the question, whether the assignee can have the benefit of a decree which is erroneous.

Lord Redesdale :—It is the decree of the creditor, and taken upon sequestration *pro confesso*.

When a plaintiff takes a decree *pro confesso*, it is his duty to see that it is right.

In such a case it is the business of the party taking the decree to see that it is right.

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The *Lord Chancellor*, on moving the judgment, in the course of stating the facts and pleadings of the case, censured the general inaccuracy of the Irish cases, and remarked, that whether the bill filed by Robert Carson was on his own behalf, or for others also, was not very material, considering that he was thereby demanding the execution of the trusts of a deed: that if Hamilton was the surviving trustee, to sell and mortgage for the payment of debts, the surviving trustee or his heir was not before the court to sustain the interests of the person for whom he was trustee; that the trust was not for the payment of the individual person of the name of Carson, but for the payment of "all and singular the debts and incumbrances in the schedule to the release annexed, together with all interest then due thereon respectively;" that the decree carrying into execution the trusts of such a deed, should not have made provision for the debt of Carson only, but should have called on the Master to enquire what debts and incumbrances remained to be paid under the effect of that trust; bringing before the Court all persons interested in that enquiry, and then paying and satisfying them proportionally, if the funds would not pay all the creditors; paying them entirely, if the fund would pay them all; paying interest to such of them as were entitled to interest, and not paying interest to such of them as were not entitled to interest: that by the original decree, which was

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taken *pro confesso* against Sir John Stewart Hamilton, the officer of the Court of Exchequer was to do no more than to audit and state an account of what was due to the executors of Robert Carson alone, on the foot of the deed of the 13th of May 1758, for principal, interest and costs : and whether this decree as to the title of Carson to interest, meant to leave that question to the officer of the court, when he was to take the account on the footing of that deed, to take an account of principal, interest and costs, if, according to the true construction of that deed, interest was due, or whether it was meant to determine that interest was due, and to call upon the officer of the court to take an account on the footing of the deed of the 13th of May 1758, of principal, interest and costs as due, did not distinctly appear.

After these observations, which were intermixed with statements of the facts and pleadings, the *Lord Chancellor* proceeded thus :—The appeal complains, that the decree was taken in the absence of Henry Hamilton, afterwards Sir Henry Hamilton, bart. who was the surviving trustee named in the deed of the 13th day of May 1758, and was then living, and was therefore a necessary party to that suit. This is the objection made to the decree of the 23d of February 1780, which is sought by the subsequent proceedings to be carried into execution, and the benefit of which is sought thereby. If that decree was an erroneous decree, they were not entitled to have it carried into execution. It appears upon the evidence, that Henry Hamilton was the surviving trustee, living at the time when this decree was

made, he was therefore the proper person to represent the *cestui que* trusts. [1820.]

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This ought not to have been the decree made in the cause, even supposing Henry Hamilton, or the other trustees to have been dead, because, as this was a deed to pay all creditors, it should have been made in the ordinary course in which decrees in such cases are made, viz. providing for the payment of all creditors, and not merely a decree for the payment of this particular creditor : in that respect also it is wrong. In the next place, the appellant, by his case, insists upon length of time, as a bar to the right claimed under the decree ; but as that point is now abandoned, it is unnecessary to discuss the question. He then further insists that the debt of 350 *l.* was a debt which ought not to have carried interest. That would be a reason for setting up the decree on the original hearing of the 14th of February 1812, which declared that the 350 *l.* was a debt of that kind, which ought not to have carried interest, except from the date of that decree. Then is stated the objection to the accumulation of interest upon interest.

The questions here, are really these: In the first place, it has been suggested at the bar, that there is a presumption, from lapse of time, that this 350 *l.* must have been paid, and that neither principal nor interest can be claimed after so long an interval. It does not appear to me, from these pleadings, that we can take that for granted ; but if there were other creditors, whose demands ought to have been provided for by this decree, they might have had a right to insist upon that proposition. The

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original decree appears to me to be a decree, the benefit of which cannot be had in this suit. That original decree is at least wrong in these respects, viz. First, that the surviving trustee was not before the Court ; Secondly, that it was not a species of decree which ought to have been made to carry into execution the trusts of such a deed as this. If I were asked which of these decrees, that giving interest or that not giving interest, was right, I should certainly say, it is my opinion, that the decree which did not give interest, was correct. The meaning of that deed was not to give interest on debts not carrying interest, and the state of the accounts tends to that opinion ; but under the circumstances of this case, it appears to me, that we can do no more than displace all these decrees, with liberty to the party to go before the Court again, and to amend these pleadings, if he shall be so advised.

Lord Redesdale :—I perfectly concur in the opinion already expressed upon the merits of the case, and upon the construction of the deed under which the sum of 350*l.* was claimed by this suit. It appears to me perfectly clear that the deed has not given interest ; the deed does not alter the nature of the debt, but merely provides for the payment of the debt. It expressly provides for the payment of interest on debts, which did carry interest, and it is silent as to any interest upon this debt. I am therefore of opinion that the deed itself does not give interest upon that debt. Whether under any circumstances interest ought to be calculated upon that debt is another question, which may come to

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be decided when there are proper parties before the Court for that purpose. The decree of the 14th of February 1812, considers the person filing that bill as entitled to the 350*l.* principal sum, with interest from the date of that decree. Whether that is correct or not, and especially as there were not the proper parties before the Court, I will not venture to say. It appears to me that nothing should be said upon the subject of the interest in the order of the House, but that the question should be left perfectly open. That decree proceeded, I suppose, on the ground that when the Court decreed the sum of 350 *l.* to be due, it was considered as the judgment of the Court, upon which interest ought to be calculated; that is not quite according to the course of a court of equity. The usual course is to direct the payment of the sum at a certain day, and then, in case of non-payment at that day, interest to accrue from the time appointed for payment. Such, however, is the form of this decree. Upon that subject I should rather wish to leave the question open.

The decree of 1780 could only be sustained under the authority of a deed, by which the estates were vested in trustees in trust for the payment of certain debts. Subject to that charge they were limited to William Hamilton, (who was the debtor) for life, with remainders over. The charge was introduced upon the estate, by an agreement between the father and the son, that the son should suffer a recovery and charge these debts of his father upon the estate. The interests therefore which were taken under that deed were the interests of all the creditors who were specified in that deed. The

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trustees hold the estate in trust for these creditors, and, subject to the claims and rights of these creditors, were trustees for Mr. Hamilton, the father, for his life, and after his death for the several persons who were entitled in remainder under the deed.

It is perfectly clear that no proper decree could be made for the purpose of raising any sum of money under that deed, without having before the Court all the persons who were interested in the property. The parties before the Court upon the original suit in which the decree of 1780 was made, were the claimant of this sum of money of 350*l.* and a further debt, a person who was represented to be the heir of the surviving trustee, and the person who was then entitled as tenant in tail to the property, subject to the payment of those debts. If Henry Hamilton, who appears by the evidence in this suit to have been at that time living, and the surviving trustee, had been a party to the suit, the decree should have directed the trusts of the deed to be carried into execution; that an account should be taken of all the debts remaining unpaid; that the amount of those debts should be raised by sale or mortgage of the estate; and that the surplus, whatever it might be, should be settled to the uses contained in that deed. The decree, instead of being to that effect, is a decree providing for this particular debt, and directing a sale to take place in consequence of non-payment of the debt, and as I observed, having before the Court not the surviving trustee, but the heir of a person who was represented to be the heir of another trustee then dead, and which heir of that trustee had no estate vested in him, for the estate

had vested at that time in Henry Hamilton, the surviving trustee.

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It is clear that the decree was erroneous in every respect; it was erroneous, unquestionably, in decreeing the party to that deed entitled to that which it then gave him; it was erroneous in decreeing that he was entitled to any thing, without giving the same benefit to the other creditors* entitled under the trust; it was erroneous in proceeding to a sale without having the surviving trustee before the Court; and therefore it is a decree which the Court can never carry into execution. The party who comes into a court of equity to have the benefit of a former decree, must show that it was a right decree, if the decree appears to be erroneous, the Court cannot carry it into execution.

In the present suit, Mr. Houghton claims as assignee under different assignments, and so far may be considered as the assignee of the debt of 350 *l.* charged by the trust deed. The decree obtained by him in the Court of Exchequer on the 26th of June 1812, by which he was declared entitled to the benefit of the decree of 1780, proceeding upon that ground, and giving him the aggregate sum which that decree provided, (except as to a sum of 50 *l.* which was so manifestly erroneous that the Court of Exchequer altered so much of the former decree); but declaring that the aggregate sum, with subsequent interest calculated upon it, should be paid to Houghton, is throughout erroneous. The Court of Exchequer had, on the 14th of February 1812, made a decree, by which only 350 *l.* with interest from the date of that decree,

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was given to the appellant. That decree is also erroneous, because that decree had not the proper parties before the Court.

The order which ought to be pronounced is, that the decree of the Court of Exchequer of the 26th June 1812, and that which followed upon it of the 20th November 1813, on further directions, should be reversed, they being manifestly throughout erroneous, and that the decree of the Court of Exchequer on the 14th of February 1812, should be also reversed; but observing that decree to be confined to the 350 *l.* to order that that decree should be also reversed, inasmuch as although the respondent may be entitled to the sum of 350 *l.* we cannot assert that he is entitled, because there are persons who ought to have been before the Court, who might have disputed whether he was so entitled or not. Although the respondent may be entitled to the sum of 350 *l.* under the provisions of the deeds of the 12th and 13th of May 1758; yet the former decree, the benefit of which was sought by the respondent, and the decree of the 14th of February 1812, do not provide for the due execution of the trusts of the deeds of the 12th and 13th of May 1758, and as there were not in any of the suits in which such decrees were made, the proper parties before the Court, the cause should be remitted to the Court of Exchequer in Ireland, with leave to the respondent to amend his pleadings, by introducing parties thereto, or otherwise, as he shall be advised. The amendment to this bill may be not only by making proper parties to it, but by framing his bill according to the rights of the parties, namely, to

have the proper trusts carried into execution. The minute which I have drawn out will comprise all these particulars.

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Die Veneris, 21^o Julii 1820.

It is ordered and adjudged, by the Lords, &c. That the decrees of the 26th of June 1812, and the 20th of November 1813, complained of in the said appeal, be and the same are hereby reversed. And it is hereby declared, that although the respondent may be entitled to the sum of 350*l.* under the trusts of the deeds of the 12th and 13th of May 1758, yet inasmuch as the former decree, the benefit of which was sought by the respondent, and the said decree of the 14th of February 1812, did not provide for the due execution of the trusts of the said deeds of the 12th and 13th of May 1758, and there were not, in any of the suits in which such decrees respectively were made, proper parties before the Court for such purpose, It is therefore ordered and adjudged, that the said decree of the 14th of February 1812, also complained of in the said appeal, be and the same is hereby also reversed; and it is further ordered, that the cause be remitted back to the Court of Exchequer in Ireland, and that the respondent be at liberty to apply to the said Court for leave to amend his bill by making proper parties thereto, or otherwise as he shall be advised.

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

ARCHIBALD, DUKE OF HAMILTON, &c. (since deceased), and ALEXANDER, MARQUIS OF DOUG- LAS, &c. ; And by Revivor, ALEXANDER, DUKE OF HAMILTON, &c. - - - - -	}	<i>Appellants ;</i>
MRS. H. P. ESTEN, (NOW SCOTT WARING,) and JOHN SCOTT WARING, her Hus- band, for his interest - -	}	<i>Respondents.</i>

UNDER a strict tailzie prohibiting alienation, but containing a power to grant leases, provided they do not exceed twenty-one years, and be not let with evident diminution of the rental, the heir of tailzie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value, with intent that the steward should underlet the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailzie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by 1,371 *l.* and, some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust. Held, that the leases, from the time of the grants until the declaration made by the trust obligations, were held in trust for the grantor, and that they were invalid as a violation of the prohibitions, and not within the permission of the deed of tailzie.

Whether receipt of the rent reserved upon the principal leases, or knowledge of and acquiescence for a considerable time in the payment to the objects of the trusts of the surplus, arising from the rents reserved upon the underleases, constitute homologation, *Quære*.

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THE family estates of the Duke of Hamilton, in Scotland, are held under the fetters of a strict entail, with all the requisite clauses to make such an entail effectual, containing an express prohibition against alienation, and a permission to let leases, provided they do not exceed twenty-one years, and be not let "*with evident diminution of the rental*."

Douglas, Duke of Hamilton, having cohabited with the respondent, Mrs. Scott Waring, (then Mrs. Esten,) who during the cohabitation had borne a daughter, the reputed issue of that connexion, and being anxious to make a provision for the mother and child, entered into a correspondence * with his agents, and took the opinion of counsel as to the most secure and effectual mode of making such provision, by granting beneficial leases of the entailed estates, to be held in trust for their benefit. In consequence of advice upon the opinion thus taken, the Duke, by a lease executed the 30th of November 1798, let to his steward and agent, John Boyes, his heirs, assignees and subtenants, certain farms, part of the entailed estates, for twenty-one years from Martinmas 1798 and 1799, at a rent nominally higher than had been paid on former leases.

* The material parts of the correspondence and the opinion, are stated by the Lord Chancellor, in moving the judgment. — *Post*. p. 208, *et seq*.

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By another lease, executed on the 8th of February 1799, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years from Martinmas 1798, other farms, being also part of the entailed estates, at rents just exceeding the rents payable on leases lately expired.

By a third lease, of the 20th and 25th of June, a farm called Bonhard was let to the same person, and for a similar rent.

On the 2d of January 1799, about a month after the date of the first lease, Mr. Boyes executed an obligation, which reciting that lease, and *certain causes and considerations*, proceeds to declare the trust, which is in the form of an agreement between Mr. Boyes and Mrs. Esten, and an obligation on his part to underlet the lands or assign the leases for the highest rents and prices which could be obtained, and after paying the rents reserved in the principal leases, to hold the surplus rents or prices which might be so obtained for the use of Mrs. Esten, during her life, and for Anne Douglas Hamilton, her daughter, *and any other after-born child or children* of Mrs. Esten and the Duke of Hamilton, in such manner as in the trust obligation specified.

On the 26th of April and 3d of October 1799, Mr. Boyes executed similar obligations by way of declaration of trust, with respect to the second and third leases respectively.

These trust obligations were not produced or known to the appellant until long after the death of Douglas, Duke of Hamilton. Whether they

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were ever by the grantor delivered to or in behalf of the respondent, Mrs. Scott Waring, and if so at what time they were so delivered, did not appear.

Douglas, Duke of Hamilton, died on the 1st of August 1799, and immediately after his death Mr. Boyes granted subleases of the lands comprised in the principal leases at rents which created a surplus of 1,370%. beyond the rents reserved upon the principal leases.

Upon the death of Douglas, Duke of Hamilton, he was succeeded in the estates and honours of the family by Archibald, Duke of Hamilton, the original appellant.

After the death of Duke Douglas, Mr. Boyes became the steward and agent of Duke Archibald, and accounted with and paid to him the rents reserved upon the three principal leases granted by Duke Douglas to Boyes, as trustee for Mrs. Esten and her issue by Duke Douglas; and with the knowledge and acquiescence of Duke Archibald, accounted with or paid to the respondent, Mrs. Waring, the surplus rents arising out of the subleases made by him to his subtenants.

Mr. Boyes died in 1812, and upon his death the principal leases vested in John Boyes, his son, as his heir and representative.

The respondents (who had lately intermarried) finding that some question was about to be raised on the part of the appellants, as to the validity of the leases and trust, required Mr. Boyes, as the representative of his father, to execute a conveyance of the principal leases and under leases in favour of new trustees; with which requisition, he having

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delayed to comply, an action of adjudication in implement, and of count and reckoning, was brought against him by the respondents in the Court of Session.

The summons in this action concluded that it should be declared ~~that~~ the principal and sub-leases were held by John Boyes, deceased, in trust for the respondent, Mrs. Scott Waring, under the trust-obligations, and that they were binding on “ John “ Boyes, as representing his father, and that he “ should be decerned to render to the pursuer, “ Mrs. Scott Waring, or to Captain Donald Mac- “ leod and Alexander Forsyth, as trustees nominated “ by her, a just and true account of his intro- “ missions with the rents of the farms therein speci- “ fied, (parts of the entailed estate of Hamilton,) and “ should be decerned and ordained to denude and con- “ vey two leases, which the said deceased John Boyes “ held of these farms, and several subleases therein “ specified, in favour of the said Donald Macleod “ and Alexander Forsyth, or otherwise, on his “ failing so to do, that the said leases and sub- “ leases should be adjudged from the said John “ Boyes, and decerned and declared to pertain and “ belong to the said trustees, in trust for the use of “ the pursuer during her lifetime.”

Action of ex-
hibition, &c

Upon this action being raised, the appellant, the Marquis of Douglas, raised an action of exhibition, count, reckoning, and payment, against Mr. Boyes and the sub-tenants, demanding that they should produce the principal lease and the subleases; and that it should be found that they had no right to possess the lands demised, and that they should be

bound to account to him for the whole rents actually payable by the sub-tenants.

The appellant, at the same time, gave in defences in the action at Mrs. Scott Waring's instance, mentioning the action which he had brought, and praying that proceedings should be sisted, until they were conjoined. In the mean time an action of multiple-pounding was brought in the name of Mr. Boyes, with the view of trying the validity of the claims of the parties.

By an interlocutor of the Lord Ordinary on the 10th of March 1812, the three actions were conjoined; and on the 11th March 1812, the Lord Ordinary pronounced the following interlocutor:—

“ Having considered the three processes now conjoined, the representation for the Marquis of Douglas, separate representation for John Boyes, esquire, and having heard parties procurators upon the whole of the action of multiple-pounding; prefers Mrs. Scott Waring and her husband, so far as he may have an interest, to the sums that may be in the hands of the raiser of the multiple-pounding, and decerns in the preference accordingly, under deduction always of the necessary expences incurred by the raiser of the multiple-pounding, &c.; prefers Mrs. Scott Waring and her husband, so far as he may have an interest, for such of the rents as may be received for the year 1813, as well as for the preceding years, and decerns in the preference accordingly.”

Against this interlocutor the appellants gave in a representation which the Court appointed to be answered.

On the 12th of May 1814, the appellants brought

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Action of multiple-pounding.

Interlocutor of the Lord Ordinary, 10 Mar. 1812.

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Action of re-
duction.
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an action of reduction and declarator against John Boyes, and the respondents, Mrs. Scott Waring and her husband, for his interest, (but taking no notice of Miss Hamilton, the respondent's daughter,) wherein they called for the production of the two leases granted by Douglas, Duke of Hamilton and Brandon, in favour of John Boyes deceased, and also the obligations of trust granted by the said John Boyes, in favour of Mrs. Scott Waring, and concluding that these writings should be reduced, set aside, and decerned, and declared to have been from the beginning, and in all time coming, to be null and void, and that the appellants should be reponed and restored against the same for the following reasons:—

1st. Because they were vitiated and erased in *substantialibus*, and defective in the solemnities required by law.—2dly. Because the said leases were granted fraudulently and confidentially by the said Duke to the said John Boyes, his factor at the time, without any value, and with a view to defraud the heirs of entail in the dukedom and estate of Hamilton.—3dly. Because the foresaid tacks and relative obligations of trust were granted, *ob turpem causam et propter causam adulterii*, that they were not actionable and could bear no faith in judgment or out with the same, and that the said leases and trust obligations being so reduced and set aside, it should be found and declared that the appellant, the Duke of Hamilton and his successors in the entailed estate of Hamilton, had the only right and title to possess the lands contained in the said leases, and that the said John Boyes and his sub-tenants, should be decerned and ordained to flit and remove themselves from the said lands, in order that the pursuers might enter thereto.

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of L. O.
9th July 1814.

By an interlocutor dated the 9th of July 1814, the Lord Ordinary found, “ that the leases being granted in trust for Mrs. Scott Waring and Miss Hamilton, so far as they were for the benefit of Miss Hamilton, they must be held to be altogether legal and unexceptionable; and so far as any benefit was by the leases conferred on Mrs. Scott Waring, it did not appear to have been with the view of her entering into or continuing in an improper course of life, but to secure a permanent income to a person, who had been induced by the granter to withdraw from a lawful and lucrative employment, and who was the mother of his only daughter; *and having been so long acquiesced in and unchallenged**, it ought not to have been made the subject of judicial discussion; therefore, in the action of exhibition, count and reckoning, and adjudication by Mrs. Scott Waring and her husband, so far as he has any interest, decerns, declares, and adjudges in terms of the conclusions of the libel; the pursuers, before extract, finding security to relieve the defender of the engagements his father came under, as a trustee for the pursuer; in the process of multiple-poiniding brought by Mr. Boyes, prefers Mrs. Scott Waring and her husband, so far as he may have any interest, to the rents and funds *in medio*; and decerns in the preference, and against the raiser of the multiple

* This is to be taken (*semble*) as an opinion and decision against the appellants, upon the ground of acquiescence, (by receipt of rents, &c. p. 199.) and laches, as distinguished from homologation. See pp. 206 and 225. To what antecedent the relative pronoun *it* in this passage refers does not very clearly appear. Whether to “ *leases*” (by inadvertence,) or to “ *benefit*,” or generally to the whole subject matter of the litigation.

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“ poinding, accordingly; Mrs. Scott Waring and
 “ her husband for his interest, before extract,
 “ finding security as before mentioned; refuses the
 “ representations for the Marquis of Douglas and
 “ for Mr. Boyes; and, in fine, in the process of
 “ reduction at the instance of the Duke of Hamilton
 “ and the Marquis of Douglas, his commissioner,
 “ sustains the defences, assoilzies the defenders from
 “ the whole conclusions of the libel, and decerns.”

To this interlocutor the Lord Ordinary sub-
 joined the following note :—“ The former decisions
 “ upon the point of *turpe pactum* do not appear to
 “ be uniform. In the case of Sir William Hamil-
 “ ton, the Lords had set aside a bond in favour of
 “ a woman who was living in adultery with the
 “ granter, while they sustained an obligation to the
 “ child, which had been born of the same con-
 “ nection. And from the case referred to, (20th
 “ July 1622. Weir,) it appears, that a bond granted
 “ to a mother in similar circumstances for behoof of
 “ her child, was set aside. But in the case of *Ross*
 “ v. *Robertson*, in 1642, a bond which had been
 “ granted to a woman in the very same situation,
 “ and after her death, to her children begot in
 “ adultery, was sustained; and although, from
 “ the statement of the case, it would appear, that
 “ some argument had been raised upon the rule of
 “ the civil law, that *turpiter facit quod sit meretrix*,
 “ *non turpiter accipit cum sit meretrix*, the more
 “ probable ground of decision seems to have been
 “ that stated by Lord Kaimes*, viz. that it was a duty
 “ and not a wrong to provide for a natural child,
 “ and for a woman, that the man had robbed of her

* Principles of Equity, B. 2, cap. 1. near the end.

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“chastity. It appears, too, (which, in a question depending on general principles of jurisprudence, must be of great weight) that in England, in a similar case*, a decree in the courts of law (Chancery) had been affirmed in the House of Lords (in 1728), though the precedent appears to have been overlooked in the case of Sir William Hamilton; and there is this difference between the formerly decided cases and the present, that there, the obligation granted to the woman and to the children of an illicit connection could not be enforced without the aid of a court of law, whereas in this case, the right of Mrs. Scott Waring and her daughter has been carried into effect, and must continue in full force, unless challenged and set aside in a court of law.”

The case having been brought before the second division of the Court, at the instance of the appellants, the Court, by two successive interlocutors, affirmed the judgment of the Lord Ordinary.

The appeal was brought against the several interlocutors before stated.

For the appellants, The *Attorney General*, and *Mr. Abercrombie*.

For the respondents, *Mr. Warren*, and *Mr. Wetherell*.

The question as to the illegality of the consideration, though strenuously argued in the Court below,

* *The Marchioness of Annandale v. Harris*, 2 P. W. 432, and 3 B. P. C. 445.

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and discussed with much ability and learning, and supported by many authorities in the printed papers, was waived in the argument before the House of Lords.

The question of homologation was argued at great length before the House of Lords. But the House being of opinion that there was nothing in the judgments of the Court below upon that point amounting to a decision, gave no opinion upon that question. The arguments therefore, and the authorities upon these two points are omitted.

The validity or invalidity of the leases, under the power, or as affected by the prohibitions of the tailzie, was the only remaining question, and that was argued by the appellants upon the authority of the judgments in the *Westshiell's Case*, and the *Queensberry Leases*, (ante, vol. 1st) and for the respondents the same arguments as in that case were repeated.

21 July 1820,
Judicial observations.

The *Lord Chancellor*, in moving judgement, observed, that Miss Hamilton had not been a party in any of the suits, and upon a statement made by the agents in the cause, that she had no interest, because the leases had expired; the *Lord Chancellor* asked, whether they had expired at the time when this suit was instituted? to which question an answer was returned in the negative.

The *Lord Chancellor* then further observed, that upon the question of homologation, the House could give no opinion whatever, there being no passage in any of the interlocutors, which expressed any opinion * of the Court of Session as to

* See the interlocutor of the L. O. p. 203, and the observations, post. 225.

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that question, and having put a question to the agents, whether he was right in that apprehension, in which they concurred, the *Lord Chancellor* then proceeded thus :—It is desirable that we should know, whether we are right in that, because the question on the validity of the leases, is certainly a very important question ; but if there had been any opinion given by the Court of Session, in the terms of their interlocutors, that there ~~was~~ homologation sufficient to sustain the leases, then if we had concurred in opinion with them, that there was homologation sufficient to sustain the leases, it would have been unnecessary to consider how the question ought to be determined about the validity of the leases, supposing there had been no such homologation ; but as far as I can find, looking anxiously at the terms of the interlocutors, the court has given no opinion whatever as to the homologation.

I can collect from the notes of the Judges opinions, what each of them probably thought about this matter of homologation ; but we cannot take that to be a matter decided in the cause, unless it is decided in the terms of the interlocutors, and that therefore will reduce the question to this way of being considered, namely, whether if it should turn out (and I am not stating any thing now with reference to that question), that we should think the leases not good leases, we must not necessarily send it back again on the point of homologation. If we thought the leases bad, it would become absolutely necessary to consider, whether they have been homologated or not ; if we thought them good, it

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would be unnecessary to consider the effect of homologation.

I know what the parties contend, and I have an opinion as to the merits of the case on the point of homologation; but we, upon that question, cannot, according to our forms, give any opinion, if it should become necessary to give an opinion, because that point appears not to have been decided in the Court below.

If the agents are agreed as to that question, we shall know how to decide the case.

Upon the question of the validity of the leases, I have made up my opinion; but as it may be necessary to go to some length in the statement of the reasons upon which our opinions must be founded, we propose to move the judgment upon the validity of the leases to-morrow. If that opinion should be that the leases are good, then it is not necessary to consider homologation at all; if on the other hand, it should be the opinion of the House that the leases were originally bad, we cannot determine whether homologation has or has not made them good. In that case the cause must be remitted. I will go so far now in the case, as to state the circumstances.

All that relates to the turpitude of the transaction, has been given up at the bar. I do not mean to say given up because it could or could not be sustained, but because it has been thought right to give it up; that is therefore a point not to be the subject of decision: but I would observe, that whatever might have been in England the law with respect to a provision for Mrs. Scott Waring

(Mrs. Esten as she then was), and the child which was her child, and supposed to be a child by the Duke of Hamilton; if the provisions for these two persons could have been supported, I apprehend, that according to the decisions of English courts, a trust for illegitimate children to be begotten between *A.* and *B.* could not be supported. I will say no more, however, upon that point; and with respect to homologation, if the leases are held to be invalid, there being no opinion of the Court of Session given upon that point, the cause must be remitted.

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By the law of England, a trust for illegitimate children, to be begotten, cannot be supported.

By the case as it is stated by the respondents, in whose printed case the whole history of this transaction is minutely traced, it appears, that Douglas Duke of Hamilton having communicated his intention to Mr. Cochrane, one of the commissioners of the excise in Scotland, who was also a commissioner for the management of the Duke's affairs, and much in his Grace's confidence, and also to Mr. Hugh Warrender, writer to the signet, his confidential agent, a correspondence ensued between the former of these gentlemen and the respondent Mrs. Waring, respecting the most eligible method of accomplishing his Grace's intentions. In a letter from Mr. Commissioner Cochrane, in answer to one from the respondent, Mrs. Waring, relative to the expediency of taking the proposed leases in her own and her daughter's name, or in the name of Mr. Boyes, the Duke's chamberlain, he says, "When I first thought of this subject, it occurred to me, that provided it could be done, the simplest and most natural method was what I see has also occurred to you, that the leases should be in

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“ your own name; I accordingly some time ago mentioned this to Mr. Warrender, (the Duke’s agent in Edinburgh) who was of opinion, that in case of the Duke’s death, such leases might be liable to be reduced by his successor in the entail, and that therefore using (the name of) some other person might perhaps be safer; I made it my business to meet with Mr. Warrender this morning, and again fully stated the matter to him, showing him at the same time your letter; the result of our conversation was, that the safest and most satisfactory thing which could be done, was to follow your suggestion, and to lay the matter at once before counsel; I mentioned Mr. Blair, Solicitor General, (afterwards Lord President of the Court of Session) as undoubtedly the best in every respect which this country can afford; such matters are understood to be entirely confidential, and the most perfect reliance may be put, as well upon his honour as upon the soundness of his opinion; Mr. Warrender agreed with me, and the opinion of Mr. Blair is accordingly to be got as soon as possible.” In an after part of the same letter, Mr. Cochrane says, “ with regard to your questions, how you and your child would be situated in case of Mr. Boyes’s death, and how your claim would be ascertained while he is living, I have only to repeat what I mentioned in my letter to Mr. Boyes, that it was understood that he was to execute a proper deed, obliging himself and his heirs to account for the surplus rents for behoof of you and your daughter.” In this sentence the plan is developed, which was finally adopted in regard to these leases. There is

a series of letters from Commissioner Cochrane, which give a clear view of the progress and the various steps which preceded its completion.

In another letter to the respondent, Commissioner Cochrane says, "Immediately upon receiving your letter this morning, I went to Mr. Warrender, who put into my hands the list of farms which he had just received from Mr. Henderson, (the Duke's sub-factor). I have accordingly requested Mr. Warrender to draw up the form of a lease to Mr. Boyes, containing these farms which expire at Martinmas 1798 and 1799, to be submitted to Mr. Solicitor Blair for his consideration and opinion, and this you may depend upon being done as soon as possible. The surplus arising from these farms, according to Mr. Henderson's estimate, is I see 1,313 £," that is, the surplus arising upon sub-leases, beyond the rents payable on the principal leases. In a postscript to a letter of this date, Mr. Cochrane says, "Since writing the above, I have this moment received from the Solicitor his opinion, of which I now send a copy, and wait your further instructions."

The case as laid before Mr. Solicitor Blair, (a very great authority undoubtedly,) is stated thus :

A. B. holds an estate under entail, with prohibitory, irritant and resolute clauses against selling, contracting debt, wadsetting or granting infestments in security. Having no lawful issue, the estate, failing him, devolves on a relation who is heir of entail. By a female friend living with him he has a daughter, and in the event of his predeceasing them, he wishes to have some provision secured to

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them. In consequence of the entail, and their particular situation, it is not in his power to grant them any provision on the estate; and though he has some real and personal estate, yet, as there are debts which may go far to exhaust the value of them, he would not wish to rest their dependence solely upon what surplus might remain. Several of the farms on the estate are out of lease at Martinmas next, or Martinmas thereafter; and owing to the progressive state of improvement, as well as the general rise of rent through the country, a considerable increase of rent will certainly arise from them. In his particular situation, it has occurred, that by granting leases to his female friend, or some trustee for her and her child, of the farms so now falling out of lease, at the present or some small additional rent, with the power of subsetting, a considerable surplus could be had by them upon subsets, and in that mode he may attain his wish of securing some provision for them. It never has been his practice to take any grassums, but always to let farms, as they became open, at the best rent that could be had, on leases for nineteen years, so that every justice in that respect has been always done to the future heirs of entail; and he does not feel that he could be accused of impropriety to them, if, in his situation, for the purpose of subsistence for his child, he should endeavour to appropriate to her the *additional* rent only, that might hereafter be got on a small part of his estate, during the currency of one lease. By the entail, "notwithstanding the prohibitive and irritant clauses," it is declared, that it shall be lawful to the first institute "and the other heirs of tailzie above spe-

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“ cified, to set tacks of the said estate, or any part thereof, for the space of twenty-one years, or the setter’s lifetime, the same not being set with evident diminution of the rental.” Was there but one farm or two, on which a surplus rent might arise to the extent of what was wished, the matter might, it seems, be easily carried into execution ; but the farms in general, in that part of the country, are small, and therefore, though the increase on each might be considerable, in proportion to the rent presently payable, yet, in order to raise on the whole a surplus equal to the provision he would wish, it would require a very considerable number of farms to be so let. His female friend is also in a particular situation. She had been formerly married in England, where her husband yet is. Articles of separation were long ago entered into betwixt them, and they have ever since lived separate. A divorce has taken place in the Doctor’s Commons, but has not been carried through the House of Peers.

On the whole, under all the circumstances, the opinion of counsel is requested ;—and more particularly,

1. If it is not in the power of the memorialist, to let leases at present, of such of his farms as expire at Martinmas next, or Martinmas 1799, for any period of years not exceeding twenty-one, and at the present rent ?

2. If the granting such a lease to his female friend, or a trustee for her, would be effectual, although not actual resident tenants ?

3. If so, could he, instead of one farm only, include perhaps twenty or thirty in one lease ?—Or

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would a separate lease for each be necessary, and would all of these be effectual?

4. If one lease, to comprehend the whole, should be deemed sufficient, would it be necessary in it to specify the rent presently payable for each, and make a specific rent payable for each? Or would a general set and *cumulo* rent for the whole be sufficient, resting on the knowledge that the rent was not less than the present?

5. Under the particular circumstances of her situation, would it be advisable to have any lease in the name of the lady herself?

6. If in the name of a trustee, would it not be sufficient that he granted a declaration of the lease being only in trust, with an obligation on him and his heirs to pay the surplus rent arising from the subsets?

The Solicitor General gave the following opinion.

“As to the first query, I have no doubt that
 “*A. B.* may at present grant leases for twenty-
 “one years, for such of the farms as will be out
 “of lease at Martinmas next or Martinmas 1799,
 “such leases being granted without diminution of
 “the rental. I even think, that *A. B.* is under no
 “limitation with respect to the endurance of the
 “leases, which he may choose to grant upon the en-
 “tailed estate, for although there is a clause in the
 “entail giving power to the heir in possession to set
 “leases for the space of twenty-one years, or the
 “setter’s lifetime, which would seem to imply, that
 “the heir was understood to be restrained from
 “granting leases for a longer endurance, yet I ob-
 “serve no such limitation in the clauses of the entail

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“ itself, and it is a received rule in the construction
 “ of entails, that restraints of this sort are not to be
 “ fixed upon an heir by implication alone, or from
 “ the presumed will of the entailer, however clear.
 “ An heir of entail in the eye of law, is proprietor of
 “ the entailed estate, and is entitled to exercise every
 “ power inherent in the right of property, except so
 “ far as he is limited and restrained by the express
 “ words of the entail. Query second. I do not
 “ think it will affect the validity of the lease, whether
 “ granted to the lady herself or to a trustee for be-
 “ half of her and her child, that the lessee does not
 “ reside upon the farms, and cultivate the same per-
 “ sonally, as the lease may contain an express power
 “ to assign or sublet.”

Much argument has been made at the bar, upon the question, whether supposing this had been *bona fide* a transaction between the lessor and lessee, the lessee at the time when the lease was constituted, and for some time after, was not a trustee for the lessor. If the appellant herself had been made the lessee, it might have been otherwise; but it is insisted, that during an interval of time (how short they say does not signify) the lessee is trustee for the lessor, and that he did not become at the time when the lease was executed immediately a trustee for the lessee, whereas, if the lady herself had been made the lessee, I think, (under the circumstances, which I shall have occasion to speak to presently,) that argument could not have been urged.

With respect to queries three and four, the learned counsel says, “ I see no objection to including any
 “ number of farms in the same lease; it may, how-
 “ ever, be proper to specify a separate rent to be

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“ paid for each farm, so as to make it appear with
 “ certainty, that there is a rise of rent, however in-
 “ considerable, upon each farm, or at least, that they
 “ are all set without diminution of the former
 “ rental. Queries five and six. Under the whole cir-
 “ cumstances of this case, I consider it to be the
 “ most eligible plan, that the proposed lease should
 “ be granted to a trustee, who must execute a back
 “ bond, declaring that he holds the same in trust,
 “ and binding himself to account for the surplus
 “ rents to the lady for behoof of herself and child, in
 “ such proportions and in such manner as shall be
 “ agreeable to the parties, and in the event of either
 “ dying during the currency of the lease, to be
 “ accountable to the survivor for her sole benefit.”

It will be recollected, that other great lawyers
 have in former cases given opinions more qualified,
 by stating, that this would be all right, unless it
 could be said to be in fraud of the entail, and it was
 that expression which led to a discussion in former
 cases* in this House, as to what was fraud upon the
 entail, and that qualification of the opinion to which
 I have alluded, was certainly of some importance; I
 mean, if there can be such a thing as fraud upon
 an entail.

Acting upon the advice of that eminent lawyer,
 the parties finally resolved that the leases should be
 granted to Mr. Boyes, and that he should declare,
 by a separate deed, that they were held in trust by
 him for the respondent and her daughter, and oblige
 himself to account on their behalf for the excrement
 rents.

Accordingly, in a letter to the respondent Mrs.

* The Queensberry Leases, *ante*, vol. i.

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Waring, Mr. Cochrane says, " Agreeably to your desire, the scroll of the lease was sent to Mr. Eiston, who, after revising it, returned it to Mr. Warrender. Two copies being necessary, one to be kept by the Duke, the other by Mr. Boyes, I accordingly send them both by this night's post, under covers addressed to the Duke. Mr. Boyes will explain the form, as to signing and witnesses. Upon the Duke's executing this lease, it will become necessary that Mr. Boyes should on his part execute the trust obligation in regard to the surplus."

The respondents then state, in their case, that " instructions were accordingly given to Mr. Eiston to frame the trust obligations." Mr. Eiston is represented, however, as labouring under indisposition, and for that reason, as it is alleged, the execution of the deeds was delayed, and this, they say, is " a circumstance which will explain the interval of time between the dates of the principal leases and the dates of the trust obligations."

In another letter to the respondent, Mrs. Waring, dated the 27th of December 1798, Mr. Cochrane says, " Mr. Eiston will, I suppose, have mentioned to you the cause of the delay in drawing up the back bond, (that is, the declaration of trust,) occasioned by his health not permitting him to attend to it. I have, however, been this moment informed by Mr. Warrender, that Mr. Eiston will send it to you in a day or two." On the 9th of January 1799, Mr. Cochrane writes to the respondent, Mrs. Waring — " Immediately upon receiving your letter this morning, I went to Mr. Warrender who informed

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“ me, that the obligation which he had sent off to
 “ Mr. Boyes, had not been as yet returned to him.
 “ As soon, however, as it is returned to him, I shall
 “ not fail to acquaint you.”

On the 30th of November 1798, the Duke let to Mr. Boyes, his heirs, assignees and subtenants, certain farms, parts of the entailed estates of the family (the names of which, it is unnecessary to detail), some for twenty-one years after Martinmas 1798, and the rest for the same period after Martinmas 1799. These farms (as the case of the respondent states) were all out of lease at the time, and a separate rent is stipulated for each, somewhat higher than had been paid by the former tacks. At the same time, the regulations, which were in use to be observed on the estate for the cultivation of the farms, were carefully preserved, and other clauses were superadded, which they say “ are greatly for the benefit of the heirs of entail.” The case of the appellant states that the farms so let were thirty-nine different farms.

By a second lease, dated on the 8th of February 1799, the former having been executed on the 30th of November preceding, (and therefore about two months and eight days afterwards), his grace also let to Mr. Boyes, his heirs, assignees and subtenants, for twenty-one years after Martinmas 1798, certain other farms, being also part of the entailed estates of the family, specifying a separate rent for each, exceeding the rents payable by the tack which had just expired, and the lease contains the same conditions and provisions as the former, for securing the interest of the grantor and the heirs of entail.

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A third lease was made on the 20th and 25th of June 1799, by which there was let to Mr. Boyes, also for twenty-one years, the farm of Bonhard, in Linlithgowshire, for a rent exceeding the former tack duty, and upon the same conditions and provisions as were contained in the former leases. The declarations of trust bear date on the 2d of January, the 26th of April, and the 3d of October 1799, the leases being dated on the 30th of November 1798, the 8th of February 1799, and the 20th and 25th of June 1799, so that there is an interval of time between each lease, and each declaration of trust, executed at those respective periods.

Mr. Boyes declares in the following manner: "that he held them in trust for the benefit of the respondent and her daughter," namely, "that for certain causes and considerations," (not stating what,) "it had been agreed upon between Mrs. Harriet Pye Esten and him, that whatever advantages or rise of money-rents could be obtained," (so that you observe here, Mr. Boyes is agreeing with Mrs. Esten, and Mrs. Esten is agreeing with Mr. Boyes, as to the advantages or rise of money-rents which could be obtained, that is, according to the ordinary sense of the language, could be obtained by Mr. Boyes from these leases), "by subsetting the lands and farms before mentioned, or by assigning the said leases, or any part thereof, should be held by him in trust for the use and behoof of the said Mrs. Esten during her lifetime, and of Anne Douglas Hamilton, her daughter, and *any other child or children that may be procreated between the said duke and her, in manner underwritten, and that*

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“ she had further reposed in him the trust and
 “ charge of collecting the surplus money-rents to
 “ be obtained by subsetting, or the prices or con-
 “ siderations to be got by assignments.”

On this narrative, Mr. Boyes, bound and obliged himself and his heirs to use all manner of diligence in getting the said farms subset, and to report his progress thereon, by delivering to the respondent “ a
 “ faithful and true account from time to time, of the
 “ rises of rent that might be obtained by subsetting,
 “ and to pay over to her during her natural life all
 “ and whatever sum or sums of money, as (which)
 “ may so be got, raised and recovered by him from
 “ subtenants or assignees, upon subsetting the said
 “ lands and farms, or any part or parts thereof, and
 “ after her death to pay over the same, along with
 “ what remains unaccounted for to herself, to the
 “ said Miss Anne Douglas Hamilton, or any other
 “ child or children she may have as aforesaid, equally
 “ amongst them or in such proportions as the said
 “ Mrs. Harriet Pye Esten may direct and appoint by
 “ any writing under her hand ; and that yearly and
 “ termly during the currency of the lease, and as
 “ soon as the same can be got in and uplifted and
 “ recovered by the ordinary and usual modes of
 “ process and diligence, deducting always all charges
 “ of management, and a reasonable allowance for
 “ his own trouble.”

Within a very few weeks after granting the third lease, the Duke of Hamilton died, (I believe within the sixty days).

Mr. Boyes proceeded to grant subleases of the farms, whereby a surplus beyond the rents payable

to the proprietor was obtained upon the whole of about 1,370 *l*.

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The questions which arise in this case between the parties, (putting out of the case now all that has been stated about the vicious consideration of this transaction,) are, whether leases made under these circumstances are to be considered as leases made within the power which the possessor, as heir of entail, had, or whether they are to be considered as leases at all; whether they are to be considered as leases in trust for Mrs. Esten, or whether they were originally to be considered as leases granted according to the power, and from the moment when they were granted, leases in trust for her, and good against the succeeding heirs of entail.

These questions came to be discussed in different actions, which have produced different interlocutors. The last interlocutor, which is a material one, is to this effect, “having considered, &c. finds, that the “leases in question are proved to have been granted “in trust for the pursuer, Mrs. Scott Waring, and “her daughter Miss Hamilton, and not as in the “case of Westshiel, to create in or reserve to the “grantor a right to part of the rents of the lands, “after his interest in them as proprietor under a “strict entail had ceased.”

The case of Westshiel was a case where a person in possession of a tailzied estate, let leases without a diminution of the rental, that is, not below the last rent that was paid; but at the same time, instead of taking a grassum, that is, instead of taking what the Scotch call a slump sum, at the time when the leases

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were made, he took bonds from the tenants to pay him yearly certain sums of money.

If I recollect that case rightly, the yearly sums were not reserved payable at the same period as the rents, but they were reserved payable by bonds yearly from the respective tenants.

It was contended on the one hand, that this was to be considered as a grassum. It was held that it was not a grassum, because it was not a slump sum, according to the then notions of grassum.

On the other hand, it was said, inasmuch as the heir of tailzie in possession might have taken grassum, there was no reason why he who could have taken 1,500*l.* at once, might not reserve 1,000*l.* to be paid to him at certain times during the currency of the lease; and if he might reserve 1,500*l.* to be paid to him prior to his making the demise, it was nothing to the substance for the heirs of tailzie what he got from the tenants for his forbearance. Instead of taking it in one sum he took it in portions of yearly payment, having just as much for his forbearance in that respect, as the value of the money during that period.

The Court of Session was at last of opinion, that although he might have taken 1,000*l.* *in presenti*, (for such was the position in that case) although he might have enjoyed that 1,000*l.* together with the interest of it, by laying it out in loans to a third person, yet that he could not lend the money to the tenants themselves, but that what was secured by these bonds was to be considered as rent, and that although the bonds had been assigned, or might have been as-

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signed, for a valuable consideration, they were in truth to be taken as so much yearly rent, and being to be taken as so much yearly rent, the succeeding heirs of entail were entitled to these yearly payments, although they would not have been entitled, as the law then stood, to any part of the 1,000 *l.* if it had been paid before, or at the time of executing the lease.

We then, as it appears to me, get into a considerable difficulty in this case, because if the Duke of Hamilton could not have reserved these surplus rents for his own benefit, in the form of bonds for money, and if the surplus rents, reserved for his own benefit in the form of bonds for money would have been bad in the hands of persons holding for a valuable consideration, you will have to consider whether it is argued unanswerably at the bar, that nothing was reserved for himself. Surely, as between the tenant in tail in possession, and the person to take after him, it is a very nice distinction, that for the actual use and enjoyment of the tenant in possession, he cannot reserve, by a separate security, such a payment; but if he has to provide for a person with whom he cohabits, and her natural daughter, he may then relieve himself of the necessity of making that provision out of another part of his fortune, and make it at the expense of the entailed estate.

That is one way in which the House will have to consider this case.

The interlocutor proceeds in these words: “ finds, “ that in so far as the leases were granted for the “ benefit of Miss Hamilton, they must be held to be

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“ altogether legal and unexceptionable ; finds that
 “ so far as any benefit was by the leases conferred on
 “ Mrs. Scott Warring, it does not appear to have
 “ been with a view of her entering into or continu-
 “ ing in an improper course of life, but to secure
 “ a permanent income to a person who had been in-
 “ duced by the grantor to withdraw from a lawful and
 “ lucrative employment, and who was the mother of
 “ his only daughter, and having been so long *acqui-*
 “ *esced in and unchallenged*, it ought not to have
 “ been made the subject of judicial discussion.”

This was afterwards adhered to by subsequent interlocutors.

In this interlocutor of the 9th of July 1814, there are many findings, which it has become unnecessary by what has been stated at the bar to attend to, and the question in which alone the House can deliver any judgment now, is, whether under all the circumstances appearing in this case, under which these instruments were made, (call them leases, or by whatever denomination you think proper to give to them), this is to be considered as a transaction which lies within the true intent and meaning of the power which the Duke of Hamilton had, or whether on the other hand, this transaction is of such a nature, that it cannot be sustained against the subsequent heirs of entail.

I will at this time only add again, that with respect to the other question, which has been very largely argued at the bar, (the question of homologation,) I am afraid we cannot deal with it. If we could, provided there has been sufficient homologation, it would not be necessary to consider whether these leases

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are in themselves good or bad ; but as we are not in a situation to authorize us to consider whether there has been homologation, we must enquire whether the leases themselves are valid according to the law of Scotland. I move that the discussion which belongs to that important question, be reserved till the House shall meet to-morrow.

The *Lord Chancellor* :—I have stated from the 24 July 1820. papers, the case of the Duke of Hamilton and Brandon against Mrs. Scott Waring.

The two questions which have been submitted to your consideration are, first, whether the leases which were made by the late Duke of Hamilton are to be considered as valid and effective leases? and secondly, if they are not, whether you are to consider the circumstances which have been stated to you in argument, as circumstances proving that these invalid leases have received validity from what is called homologation ; or whether on the other hand there is only acquiescence, not in its effect equivalent to homologation? With respect to the latter question, I stated the other day, that it appeared to me that we should not rightly proceed according to our usage, if we now gave an opinion upon it.

If you hold the leases to be valid, it is not necessary to consider the other question : if you hold the leases to be invalid, it appears to me it will be absolutely necessary to remit the cause to the Court of Session, in order that the court may consider whether the circumstances stated to amount to homologation, do or do not give validity to these leases,

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The first question, whether the leases are valid or not, is certainly an important question in a great many views. It appears to me, that your decision may bear on a great many cases which have not yet come into controversy. I have endeavoured to look at the case in all the points of view in which it may possibly affect such cases, but into the discussion of those points it does not appear to me prudent, or at all events necessary at present to enter. The opinion which I have formed with respect to these leases, (an opinion which I entertain with great confidence) is, that these leases are not valid. The ground upon which I satisfy my mind as to that question, is, that when these leases were executed, they appear to me to have been leases for the benefit of the Duke of Hamilton himself. Without entering into the question whether the making a provision for another person is a benefit to himself, it appears to me, that at the time when these leases were actually made and in existence, the Duke of Hamilton might have disposed of the leases as he pleased. He was under no more obligation to give them to Mrs. Esten than to any other person, and if a lease under such circumstances, executed by the person in possession of an estate tail, would not be a good lease, it appears to me that it will make no difference in principle, whether he makes a present of that lease soon after it is executed, or at a distant period from the date of its execution, and upon that ground alone, my opinion is, that these leases were not good. There are other grounds also on which, as it appears to me, the validity of the leases

might be affected ; but it is not necessary for me, at least in my view of the case, to proceed to examine those other grounds.

The judgment, therefore, which I think the House ought to pronounce is, a judgment asserting the invalidity of these leases, and sending the case back again, with that finding, to the Court of Session, in order to have the question determined how far the plea of homologation can or cannot be supported. I therefore move the House to ~~find~~, that the leases in question were leases not warranted by the power contained in the deed of entail, and were therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the present Duke of Hamilton and Brandon ; and so far as the same were not so homologated, to reverse the interlocutor complained of, and to remit the cause to the Court of Session to review, subject to this finding, and to do therein as is consistent with right.

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24th July 1820.

The Lords find, that the leases in question were not warranted by the power contained in the deed of entail, and therefore subject to reduction, unless the same were homologated by the late Appellant Archibald Duke of Hamilton, deceased, and by the Appellant Alexander now Duke of Hamilton, and so far as the same were not so homologated respectively ; and therefore, it is ordered and adjudged, that the interlocutors complained of be reversed ; and it is further ordered, that the cause be remitted back to the Court of Session, to review the same, subject to the above finding.

Order.

IRELAND.

ON APPEAL FROM THE COURT OF CHANCERY.

ROGER MONTGOMERY HAMILTON }
 M'NEILL, and DANIEL M'NEILL, } *Appellants*;
 Esquires - - - - - }

MICHAEL CAHILL, and ROBERT }
 GROVE LESLIE, Esquires - - - } *Respondents*.

WHERE a deed of marriage settlement is drawn up, as between the intended husband and wife, and their respective fathers; and the father of the wife secures to the father of the husband, a sum of money, as the portion of the wife, according to a provision of the deed; but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father; it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement.

If two deeds be executed, bearing different dates, that which is first registered, even with notice of the other deed, has priority both in law and equity, although it be posterior in date and execution.

On points, in which the two deeds are inconsistent, the deed last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered.

A transaction of sale made upon a false or mistaken consideration between parties in the relation of brothers-in-law; the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made; but if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts.

Upon a bill by the vendor, seeking to rescind the sale, on the ground of fraud and oppression in the transaction, and error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time.

If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the court, on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before; but in such case the suit ought to be disposed of without prejudice to the matter omitted to be put in issue, which the plaintiff may prosecute in any future suit.

If the plaintiff in a suit has, by the course of the court, a right to a decree for an account, he does not forfeit such a right by refusing an account which is offered by the defendant or the court at the hearing. It is the duty of the court to decree an account *ex officio*; and if such decree is not made, it is a valid ground of appeal, notwithstanding the refusal of the plaintiff.

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits, annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity, at the instance of the insolvent himself, must be rescinded, on the ground of public policy.

THIS was an appeal from a decree of the Court of Chancery, in Ireland, made in a cause in which the appellants were plaintiffs, and the respondents were defendants, by which decree the plaintiff's bill was dismissed with costs; and from a subsequent order of the court, by which an application, on behalf of the plaintiffs, for liberty to file a supplemental bill, was refused with costs.

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Marriage con-
tract, 1743.

The case, as it appeared in the pleadings and proceedings, comprised the following facts :

By a marriage contract, dated the 15th of June 1743, and made between Roger (Hamilton) M'Neill (the father of the appellant Roger) on the one part ; and Elizabeth Price, his intended wife, and Cromwell Price, her father, on the other part, and executed according to the forms of the law of Scotland, Roger, the father, bound and obliged himself to settle a certain estate, called the Taynish estate, in Scotland, upon the heirs male of the intended marriage, subject to a life rent or estate for life to himself, and to a jointure and portions for the younger children of the marriage, and subject also to the charges and conditions therein mentioned*.

By the Appellant, on the application for leave to file a supplemental bill, it was alleged that the limitation of the estate was perfected according to the law of Scotland ; and that one part of the settlement having been deposited and recorded in the proper office in Edinburgh, in the year 1768, Cromwell, Price in 1769, instituted certain proceedings, and obtained, in the courts of Scotland, an inhibition restraining Roger, the father, from selling, aliening or encumbering that estate.

The marriage took place, and there was issue two children, viz. a son, (the Appellant Roger,) and a daughter, Margaret.

1773 Marriage
of Respondent
Cahill.

In the year 1773 the Respondent Cahill intermarried with the daughter Margaret.

1777. Marriage
of appellant
Roger.

In the year 1777 the appellant Roger inter-

* This contract was not put in issue in the cause, and it became the subject of discussion only, so far as the right to give it in evidence, or to amend the bill, or file a supplemental bill, to put it in issue, was in question.

married with Catherine Chambers, the daughter of Daniel Chambers.

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Limitations of the Irish estates of the M'Neill family, at the time of this marriage.

At the date of the Appellant's marriage, the Irish estates of the M'Neill family stood limited as follows, viz. the Shanvally, or Dunseverick estate, in the county of Antrim, (the rents of which amounted only to the sum of 234*l.* a year, above chiefry and other charges of receipt, &c.) was limited to Roger the father, for life, with remainder to the Appellant Roger in tail, with the reversion in fee to him and his heirs; the Ballylesson, or Newgrove estate, in the county of Down, was limited, (subject to certain charges,) to Archibald M'Neill Montgomery, a brother of Roger the father, for life, with a general power to charge the estate with 2,000*l.* (which power was exercised by will,) with remainder to Roger, the father, for life; with remainder to the Appellant Roger, for life, with a power to charge the estate in favour of any wife, with a jointure of 200 *l.* a year, with remainder to the first and other sons of the Appellant Roger, successively, in tail male, with remainders over; and the lands called Sheeplands, in the county of Down, held by lease for lives renewable for ever, and the lands called Loughmoney and Carrowcarland, in the same county, held under fee farm grants, were limited to Archibald M'Neill Montgomery, in tail, or *quasi* tail, with remainder to Roger the father, for life, with remainder to the Appellant Roger, in tail, or *quasi* tail, with remainders over.

Archibald had demised the Ballylesson estate to his brother Roger, for the term of Archibald's life, at the rent of 400*l.* a year, under which demise Roger, the father, was then in possession of that estate.

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v.

CHAMBERS.

Indenture of
settlement of
the 15th Oct.
1777.

By an indenture, dated the 15th of October 1777, being a settlement made previously to the marriage of the Appellant Roger, and Catherine Chambers, the Dunsceverick estate was vested in William Gillespie, (the attorney of the M'Neill family,) in trust, in the first place, for the payment of certain debts mentioned in a schedule annexed to the indenture; and then, out of the rents, to pay 200*l.* a year to the Appellant Roger, during the life of his father, for a present maintenance, (which was to be increased to 400*l.* a year, chargeable on other lands therein mentioned, and which devolved to Roger, the father, on the death of Archibald M'Neill Montgomery,) and subject thereto, to the use of Roger, the father, for life, with remainder to the Appellant Roger, in tail male, with reversion to him in fee. By this deed, the appellant Roger, in exercise of his power, charged the Ballylesson estate with a jointure of 200*l.* a year, in favour of Catherine Chambers; and Daniel Chambers agreed to pay Roger, the father, the sum of 500*l.* as a portion with his daughter. The deed contained an agreement to suffer a common recovery of the estate, which was duly suffered accordingly in Trinity term 1778.

Debts charged
by this deed.

The debts set forth in the schedule to the settlement were, a debt of 1,500*l.* due to William Gillespie; a debt of 150*l.* due to Sir Patrick Hamilton; and a debt of 250*l.* due to Skeffington Thompson, and others: all these debts, except that to Sir Patrick Hamilton, had been previously secured by the Appellant Roger, and his father, jointly.

The debt of 1,500*l.* was owing to Gillespie for his bills of costs, and for money advanced by him in a suit between Roger, the father, and his brother Archibald,

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relative to the Ballylesson estate, and which was compromised on the settlement of the estate, according to the limitations before stated. The debt of 150*l.* was originally the debt of the father; the debt of 250*l.* was the debt of the appellant Roger.

Roger the father, the appellant Roger, and William Gillespie, executed this settlement, but Chambers and his daughter refused to execute, and prevailed on the appellant Roger, before the marriage had been solemnized, to execute another settlement in the form of marriage articles, bearing date the 25th of October 1777. By those articles, the appellant Roger covenanted, that as soon as he should become seised of the several lands of Dunseverick, &c. of which his father was then seised in the counties of Down and Antrim, he would vest the same in trustees therein named, to the use of himself for life, with remainder to the first and other sons of the marriage, successively in tail male, subject to a jointure to Catherine Chambers of 400*l.* a year, 200*l.* a year of which was to issue out of the Shanvally or Dunseverick estate, and with a provision for raising 6,000*l.* as portions for the younger children of the marriage.

Marriage articles of the 25th October 1777.

In these articles no notice was taken of the first settlement, or of the debts mentioned in the schedule annexed to it, or of any of the provisions contained in that settlement.

By the activity and contrivance of Daniel Chambers, the articles were registered before the indenture of settlement; the articles having been registered on the 7th, whereas the settlement was not registered until the 13th of November 1777.

Registry of the marriage articles, 7th Nov. 1777. Registry of the settlement, 13th Nov. 1777.

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CAHILL.

Notwithstanding the execution of the articles, and refusal to execute the settlement, Daniel Chambers sent to Roger, the father, his bond to secure the 500*l.* portion provided by the settlement; and William Gillespie, the trustee, was permitted to enter without dispute into the possession of the Dunseverick estate, under the trusts of the settlement; the yearly sum of 200*l.* was paid to the appellant Roger, and the surplus rents were applied by Gillespie in the reduction of his debt.

Roger, the father, was not informed of the execution of the articles until after it had been accidentally discovered in 1781, on searching the registry; but Gillespie having obtained information of the fact, took preliminary steps for obtaining a *custodiam* against the Ballylesson estate, in order to enforce the payment of his debt. To prevent that proceeding from being executed, Roger, the father, paid Gillespie 1,150*l.* part of his debt.

The father also paid some debts of the appellant Roger: and by the request of the father, the respondent Cahill paid other debts.

Sale of Tay-
nish estate,
1779.

* In the year 1779, Roger, the father, sold the Taynish estate to Sir Archibald Campbell, for 21,000*l.*; which sum was paid to Roger, the father, or allowed in account with the respondent Cahill, as his executor.

A sum of 10,000*l.* or thereabouts, part of the 21,000*l.* for which the Taynish estate was sold, was applied in paying off different incumbrances on the estate, including 2,000*l.* the portion of the respondent Cahill's wife, as the only younger child of Roger, the father, and Elizabeth, his wife; and the

remainder of the 21,000 *l.* except about 700 *l.* was received by Roger, the father.

In the year 1779, Roger, the father, granted to the respondent Cahill a lease of Mountain farm, part of the Dunseverick estate, for three lives, or sixty-one years, at the rent of one shilling a-year during the life of the lessor, and of 14 *l.* a-year afterwards. It having subsequently appeared that this lease exceeded the power of Roger the father, the appellant Roger, in the year 1785, confirmed the lease, by a memorandum indorsed on the instrument of demise, noticing the defect, and also executed in favour of the respondent a lease of the farm for sixty-one years, to commence from the death of Roger the father, at the rent of 14 *l.* a-year, at the same time promising, that when he came into the possession of the estate, he would grant a lease for the like term at a nominal rent. This he did, of his own accord, in the year 1794, after his father's death, and instructed his bailiff not to demand the rent of 14 *l.* accrued during the interval.

In December, in the year 1784, Archibald M'Neill Montgomery died without issue, when the estate of Sheeplands, Loughmoney and Carrowcarland devolved to Roger, the father, under the limitations before stated, and the appellant Roger, from that time received the additional 200 *l.* a-year, provided by the settlement.

On the 10th March 1788, Roger, the father died, having made his will, whereby he made the respondent Cahill's wife residuary legatee of his personal estate, and the respondent Cahill his executor. By a clause in the will, the following direction was given: "as to all sum or sums of money, which I have paid for

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1779. The lease of the Mountain farm;

confirmed by the appellant Roger, in 1785.

Lease by the appellant Roger, in 1785.

Lease by the appellant Roger, in 1794

Death of A. M'Neill Montgomery, in Dec. 1784.

Death of Roger, the father, 10th March 1788; will dated 7th March 1788.

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“ or on account of my son, Roger M'Neill, and for
 “ which he was joined as security with me, it is my
 “ will, that all such sum and sums shall remain and
 “ be a charge against my son and his estate, and
 “ that the same shall be paid to my daughter, or be
 “ by her raised off the said estate, by sale or other-
 “ wise, as the law shall enable her to do ; in regard,
 “ I did, by a settlement executed on my son's mar-
 “ riage, grant to him an annuity off my said estate
 “ during my life of 200 *l.* a-year, and also gave him
 “ up the estate of Sheeplands, in consideration, that
 “ he should pay off certain debts, and also exonerate
 “ me from said joint securites, which he has failed
 “ to do,” &c.

The Appellant, Roger M'Neill, for several years before the death of his father, had been very much involved in debt. At the time of his father's death he was in Scotland. The respondent Cahill, in the year 1789, called upon him there, and showed him a list of debts, which he alleged had been paid by Roger the father, for the Appellant Roger M'Neill; and the respondent claimed to be entitled to the amount thereof, under the will of the father, against the appellant Roger M'Neill, and his estates. The respondent Cahill also represented to the appellant, Roger M'Neill, that his estates were liable to those debts; and knowing the embarrassments of the appellant, (as he alleged,) the respondent proposed to lend him a sum of two hundred pounds upon his bond, which the appellant agreed to borrow, and thereupon was induced, for the consideration of 3,500 *l.* part of the alleged debts, to convey to the respondent Cahill, the lands of Loughmoney, Carrowcarland and

28th May
 1789. Con-
 veyance of
 Sheeplands.

Sheeplands, being of the annual value of 180*l.* or thereabouts, by deed dated the 28th day of May 1789.

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CAHILL.

The claims set up by the respondent Cahill, as executor of Roger H. M'Neill, against the appellant, Roger M'Neill, and his estates, consisted of the following items of account:—

	£.	s.	d.	£.	s.	d.
1777. Sep. 10:						
To Gillespie's bond - - - - -	1,500	-	-			
Interest to 10th Sept. 1788, at 90 <i>l.</i> per ann.	990	-	-			
	2,490	-	-			
Paid by disbursements, as per Gillespie's acc ^t	276	19	5½	2,213	-	6½
To Sir Patrick Hamilton for - - - -	150	-	-			
Interest to September 1788, at 9 <i>l.</i> per annum	99	-	-	249	-	-
1778. March:						
Bond to J. Malcolm, assignee to Fulton -	60	-	-			
Interest to Sept. 1788, at 3 <i>l.</i> 12 <i>s.</i> per ann.	34	4	-	94	4	-
From the records of judgments, the date of the bonds and sum of interest, therefore uncertain.						
1778. Trinity Term:						
William Moore's judgment, 103 <i>l.</i> 8 <i>s.</i> 5 <i>d.</i>	51	14	2½			
Interest, 10 years, at 3 <i>l.</i> 2 <i>s.</i> per annum -	31	-	-	82	14	2½
1781:						
Per Mr. Fulton's account, on preceding page	1,100	6	3			
Interest 7 ½ years, at 66 <i>l.</i> per annum - - -	495	-	-	1,595	6	3
1788. March 10th:						
Legacy on New Grove estate, from Mrs. Anne M'Neill to her grand-daughter Margaret, assigned by her and her husband to William Gillespie, and further assigned by him to Fulton - - - -	200	-	-			
Interest to 10th September 1788 - - - -	6	-	-	206	-	-
	£.			4,529	18	3

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This account was furnished by the respondent Cahill, to the appellant Roger M'Neill, in Scotland, a few days previous to the execution of the deed of conveyance, and at a time when the appellant Roger M'Neill, (as he alleged) was unacquainted with the nature or particulars of the account, or with his late father's affairs, and when he was, to the knowledge of the respondent, in great distress, and had no opportunity of having the advice of his friends or legal assistance.

The principal sum of 1,500*l.* due to Gillespie, as mentioned in the account, with interest to the amount of 990*l.* which (as appears by the date in the schedule) accrued in the lifetime of the testator, was the proper debt of the father, Roger Hamilton M'Neill, the appellant Roger being a mere surety. Part only of the debt to Gillespie had been paid by Roger Hamilton M'Neill, namely, to the amount of 1,130*l.* principal money, which was paid out of the purchase monies of the Taynish estate. The balance of Gillespie's account, to the amount of 392*l.* 9*s.* 7½*d.* had been paid by the appellant Roger M'Neill, since his father's decease.

Sir P. Hamilton's debt.

The debt to Sir Patrick Hamilton, (being a judgment) for 150*l.* with ten years interest, amounting to 99*l.* which accrued in the lifetime of Roger Hamilton M'Neill, was the sole exclusive debt of Roger Hamilton M'Neill, the appellant not being joined therein as a surety.

Fulton's debt.

The debt to Fulton, amounting to the principal sum of 1,100*l.* 6*s.* 3*d.* with seven years and a half's interest thereon, amounting to 495*l.* consisted partly of debts owing by Roger Hamilton M'Neill,

and partly of debts owing by the appellant Roger M'Neill, discharged by his father, and principally paid out of the purchase money of the Taynish estate.

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No consideration was given or paid by the respondent Cahill for the conveyance of 1789, except the credit on the foregoing account to the amount of 3,500 *l.* and the sum of 200 *l.* lent by the respondent to the appellant Roger M'Neill, which was secured by his bond and warrant of attorney, to confess judgment.

The appellant Roger M'Neill, in the month of May 1790, was arrested for debt, and detained a prisoner at the suit of several of his creditors until the month of June 1791, when the respondent Cahill, claiming to be a creditor of the appellant, to the amount of 200 *l.* applied by petition to the Court of King's Bench in Ireland, under the compulsory clause in the Irish act 31 Geo. III. for relief of insolvent debtors, to compel the appellant to make discovery of his real and personal estate, to the end that the same should be applied in payment of his debts; and the appellant, having given such accounts and schedules as required by the act, was discharged from confinement under the provisions of that act.

1790. Appel-
lant Roger
arrested;

and discharged
under the In-
solvent Act.

Henry Coulson, one of the Masters of the Court of Chancery, was first appointed assignee of the estate and effects of the appellant, Roger M'Neill; and upon his decease, by an order of the court, in the matter of the insolvent, bearing date the 3d day of August 1801, the respondent Cahill was appointed in the place of Henry Coulson, and acted as assignee.

1801. Aug. 3.
Order appoint-
ing responden-
Cahill as-
signee.

1820.

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Memorandum
of agreement.
17 Sept. 1801.

The respondent Cahill, after he became assignee of the estate of the appellant, entered into a treaty with him, upon the foundation partly of the old account, including some of the debts alleged to have been paid by the father, and claimed by the respondent Cahill as executor, according to the preceding statement ; and by a memorandum of agreement, bearing date the 17th day of September 1801, after reciting that the respondent Cahill claimed to be a creditor of the appellant, Roger M'Neill, as assignee of a judgment debt obtained by Skeffington Thompson, against the appellant, as assignee of a judgment debt obtained by Sir Patrick Hamilton against the appellant's father, on the foot of two judgments obtained by the respondent against the appellant ; and also on account of a legacy devised by Ann M'Neill to Margaret, the wife of the respondent ; and also on account of the rents of the lands of Sheeplands, Loughmoney and Carrowcarland, which were thereby stated to have been applied in payment of the *custodiam* and *elegit* debts of the appellant, (the several claims according to the respondent's statement, amounting to 3,000*l.*.) and reciting that the claims were disputed by the appellant ; and further reciting that the respondent had agreed to accept 1,500*l.* in full of all demands against the appellant ; it was thereby agreed, that the respondent, as assignee of the appellant, under the order of the 3d day of August then last, should enter into possession and receipt of the rents of the Ballylesson estate, upon trust, in the first place, to pay thereout 227*l.* 10*s.* yearly in manner therein mentioned, to the appellant Roger M'Neill ; and also a sum of

120*l.* as a maintenance for Catherine M'Neill, wife of the appellant Roger M'Neill, and her family; and after payment thereof, to apply the surplus rents and profits in discharge of the sum of 1,500*l.* with interest.

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The respondent Cahill was afterwards, on the motion of the appellants, removed, and the respondent Robert Grove Leslie was appointed assignee in his place.

The original bill in this cause was filed on the 6th of June 1808, by the appellants, and Charles Crauford, a trustee for the appellant Daniel, under a conveyance by the appellant Roger M'Neill, against the respondent Cahill. The bill (comprising allegations of most of the preceding facts) stated, that Roger the father was seised of an estate for life in several lands in Ireland and Scotland, which were by *certain deeds* respectively limited in remainder to the appellant Roger, &c. ; that at the time of the appellant Roger's marriage, he and his father were tenants for life of the estates in the county of Down, and also of the Scotch estates, *except the lands of Taynish in Scotland*, which the appellant Roger joined his father in selling for payment of debts; that the estate was sold at an undervalue; but by a deed on record in Scotland, it was stipulated that after payment of the debts affecting the estate, the remainder of the purchase money should be vested in securities for the benefit of the appellant Roger and his family; that the lease of the Mountain farm was obtained by undue influence; that the will also was obtained from the father by undue influence; that the debts mentioned in the will had been paid by the father out of the purchase money of the Taynish estate; that the sale and conveyance of Sheeplands was fraudulently, and with-

Original bill
filed 6th June
1808;
Answer,
17th June
1809.

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CAHILL.

out fair consideration, obtained by the respondent Cahill from the appellant Roger M'Neill, while he was in a state of embarrassment as to his affairs, and ignorance as to his rights; that the debts, which formed part of the consideration, were the debts of the father; and that the agreement of 1801 was obtained in like manner, and in fact for the same consideration, the appellant Roger M'Neill, being at the time insolvent, and the respondent Cahill, his assignee. The bill, among other things, prayed a general account, including the purchase money of the Taynish estate; and that the conveyance of 1789, the agreement of 1801, and the lease of the Mountain farm might be set aside.

The respondent Cahill, by his answer, denied that the appellant Roger M'Neill joined in the sale of the Taynish estate, and alleged, that the father was seised in fee of that estate. He denied the existence of any deed settling the residue of the purchase money, on the appellant R. M. H M'Neill and his family. He denied also the imputed influence and fraud in obtaining the lease, agreement, conveyance and will. He contended, that the consideration for the conveyance was full and fair; that the judgment owing to Gillespie, was on a bond given to him for costs and services in a suit relating to the Ballylesson estate, from which the appellant derived benefit; and that the consideration was immaterial, because it became by contract a charge on the appellant's estate; that the father paid Gillespie 1,150*l.* and other sums to other creditors. He denied that the debts so paid were the debts of the father; and represented that the appellant's solicitor took objections to the accounts when

furnished, which were answered, and the appellant acquiesced.

1820.

After this answer was filed, the appellants made an application for an injunction and receiver, which was refused.

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v.
CAHILL.

On the 8th of August 1811, before the examination of witnesses, the appellants filed a supplemental bill, which stated the appointment of the respondent Cahill, as assignee, and his removal; that the life interest of the appellant Roger M'Neill, in the lands in question, had been sold and conveyed to the appellant Daniel M'Neill, by the new assignee; that Crauford was no longer a necessary party, and prayed the same relief as the original bill, with a few variations, not material to be stated.

In his answer to the supplemental bill, the respondent Cahill stated, that the motion for removing him from his situation as assignee, was unopposed, owing to the absence of his counsel on the circuit, and the circumstance of the appellant's solicitor having detained an affidavit on which he intended to oppose the motion, and that the Lord Chancellor, in that instance, acted solely on the principle of the propriety of dissolving that kind of relation between persons so deeply involved in hostile litigation. He admitted the receipt of 1,209*l.* 3*s.* 3*d.* as assignee, and that he applied the same in payment of the debt due to himself, and did not pay any other creditor of the appellant Roger, because no other creditor had proved any debt against the insolvent's estate; and if any other creditor had proved, that his own were the preferable debts: that by an order of the Irish Court of Chancery, a sum of

Answer to
supplemental
bill.

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v.

CARILL.

6,000*l.* was lodged in the Bank of Ireland, to answer the demands of the fair creditors of the appellant Roger M'Neill, and by another order made in December 1814, the appellant Daniel undertook by his attorney, in open court, to pay to the respondent any sum not exceeding 6,000*l.* which should finally appear to be due to him.

A replication was filed to the answer to the supplemental bill, and issue being thereupon joined, the appellants and the respondents proceeded to the examination of witnesses, and publication having passed, the cause came on to be heard before the Lord Chancellor of Ireland, on the 20th of May 1816, the same having previously stood over to give the appellants time to amend their bill, for the purpose of bringing the respondent Robert Grove Leslie before the Court.

The only points particularly urged at the hearing, were those relative to the purchase money of the Taynish estate, and the sale of Sheeplands. In regard to the former, the appellants were not allowed to read the marriage contract of 1743, nor the inhibition of 1769, as they had not been put in issue by the pleadings, and no deed having been produced, showing the appellant's title to any part of the purchase money for the Taynish estate, according to the allegations contained in the bill. The following decree was made :—

Decree.

“ Upon reading the proofs, &c. and the defendant
 “ having offered to account, as on foot of the deed
 “ of the 17th of September 1801, in the pleadings
 “ mentioned, and the plaintiffs declining the same,
 “ it is this day ordered, adjudged and decreed,

Cause heard
 on the 20th
 May 1816.

“ that the plaintiffs’ bill in this cause, and all and
 “ every the matters and things therein contained be
 “ and the same is hereby dismissed, with costs, to
 “ to be taxed against the plaintiffs.”

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 CAHILL.

On the 26th of June 1816, the appellants pre-
 sented to the Lord Chancellor a petition for leave
 to file a further supplemental bill, on the ground of
 the new matter therein alleged to have been dis-
 covered, after issue was joined, and also for a re-
 hearing. It was supported by an affidavit of the
 appellant Daniel.

26th June
 1816. Petition
 for a rehearing,
 and leave to
 file a supple-
 mental bill.

In this affidavit the appellant Daniel, after referring
 to the settlement of the 15th of June 1743, states:—

Affidavit of
 appellant
 Daniel.

“ That one part of the settlement was deposited in
 “ the proper office for registering deeds in Scotland,
 “ and the other part always remained in the posses-
 “ sion of Roger the father.”

“ That he did not, nor did the appellant Roger,
 “ as he believes, know of the registry of the said
 “ deed, or the proceedings had therein, or any of
 “ them ; nor did deponent, or the appellant Roger,
 “ get possession of the other part of the original
 “ deed, until after the death of Roger the father.

“ That his solicitor procured the part of the said
 “ settlement now in his possession, at the time of the
 “ commission, which was sped for the examination
 “ of witnesses in Scotland in this cause, in the latter
 “ end of August, and beginning of September last,
 “ and not before ; and until that time, deponent, and
 “ the appellant Roger, as he believes, were ignorant
 “ of the precise nature of their rights under the said
 “ deed of settlement, of the 15th June 1743, and
 “ the inhibition of the 15th August 1769, and
 “ therefore the same were not put in issue, &c.

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CAHILL.

" That at the time of the said examination of witnesses in Scotland, it was for the first time, as he believes, discovered by the appellants, that proceedings were had in the Scotch Courts in 1768 and 1769, at the instance of Cromwell Price, and Elizabeth Price, otherwise M'Neill, his daughter, for the purpose of obliging Roger, the father, to carry the trusts of the said settlement of 1743 into effect; and on the 15th August 1769, an inhibition containing a statement of the said deed or settlement, was obtained from the said court, inhibiting or restraining Roger, the father, from selling, alienating, or incumbering the estate of Taynish; an attested copy of which hath been regularly proved in the cause."

The appellant Roger M'Neill, made no affidavit in support of the petition.

Upon the coming on of the petition, on the 26th June,

Order on
Petition.

" It was ordered, that this cause be set down to be re-heard: And further, that plaintiffs be at liberty to file a supplemental bill in aid of such re-hearing, for the purpose of putting in issue the settlement of 1743, and the inhibition of 15th August 1769, and the effect and operation of the same according to the laws of Scotland, relating to the said Taynish estate, upon paying costs, &c."

1816, July 10.
Motion to rescind the order, giving leave to applicants to file supplemental bill, unless cause shewn in ten days.

The above petition having been presented without any notice being given of it to the respondents, and the order having consequently been obtained by surprise, the respondent gave the appellants notice of a motion to set aside the said order, so far as the same related to the filing of a supplemental bill; and a motion was made accordingly, on the 10th of

July 1816, when it was ordered, that the plaintiffs should be at liberty to file a supplemental bill, unless in ten days cause be shown to the contrary.

The respondent afterwards filed an affidavit, in answer to the appellant Daniel's affidavit. In this affidavit the respondent, among other things, states :

“ That the cause or suit instituted by Cromwell Price, as the trustee of Mrs. M'Neill, and her children, mentioned in the affidavit of the appellant Daniel, in which suit the inhibition was obtained, was as deponent believes, after the time when the said inhibition was granted, heard, and the said Cromwell Price failed therein, as deponent believes, and thereupon the said inhibition was determined.

Affidavit of
respondent.

“ That the appellant Roger must have been fully aware, before the commencement of this suit, of the marriage settlement of 1743, and of his rights thereunder ; for in a document proved in this cause, given to deponent by the said Roger, in the year 1807, a few months only before the filing of the bill, and drawn up shortly before on the part of the said Roger ; it being a statement of claims made by him against one Doctor James M'Neill, express mention was made of the said settlement, and the rights of the said Roger, under the same, are alluded to therein : that it is further evident from this, that the said Roger was acquainted with the said settlement ; because at the time of the execution of the deed of conveyance of the said Tavnish estate to the purchaser, he, in the presence of the deponent, refused to execute the

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“ same, and said that he would not part with his
 “ claim to the said lands: and the said Roger,
 “ at the time when deponent was in habits of
 “ intimacy with him, which continued at intervals
 “ until the year 1807, used repeatedly to talk of
 “ recovering the said estate from the purchaser.”

20th July 1816.

Cause was
 shown upon
 this affidavit,
 and allowed.

On the 20th July 1816, cause was shown against the last-mentioned order, on behalf of the respondent Cahill, grounded on his affidavit. The respondent at the same time read from the appellant's original bill a passage, in which he speaks of the receipt of 2,000 *l.* by the respondent Cahill, as the portion of his wife, and to which his wife was entitled under the settlement of the Taynish estate. A passage was also read from a letter of attorney, executed by the appellant Roger, and recited in a state of claims, which was delivered by the appellant to the respondent and proved in the cause, in which it is provided, that the attorney “ shall pay the rents of
 “ Raplock during the life of R. H. M'Neill, agree-
 “ able to and in terms of the contract entered into
 “ between the said R. H. M'Neill and Mrs. Elizabeth
 “ Hamilton Price, my mother.” References were also made to the interrogatories filed by the appellant, and the depositions of a witness in the cause, Walter Moir, who in answer to those interrogatories, stated, that his father was the agent of the appellant Roger, and that on his father's death, the deed of settlement, of the Taynish estate came into his hands as executor, among other papers relating to that estate. The court on this evidence set aside the former order with costs.

Against the decree of the 20th May 1816, and

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the order of the 20th July 1816, this appeal was presented on the 10th of February 1817*.

* On the 4th of March 1817 a petition was presented to the Lords in the name of the appellant Roger, praying that his name might be struck out of the appeal, and that the appellant Daniel might pay costs incurred thereby. On the 24th of March the respondent Cahill presented a petition, praying to withdraw his answer to the appeal, so far as, &c. On the 25th of March the appellant Daniel presented a petition, praying that the two former petitions might be dismissed.

The petitions of the appellant Roger, and the respondent Cahill, set forth instruments executed by the appellant Roger, purporting to be a disclaimer and release, on his part, of the matters pending in the cause, and empowering his attornies, therein named, to appear and disavow the proceedings. The petition of the appellant Daniel, setting forth various circumstances, represented that the instruments were procured by misrepresentation, fraud and circumvention, and by advantage taken of the distress and embarrassments of the appellant Roger, who was at the time a prisoner for debt.

The Lords Committee, to whom the petitions were referred, reported their opinion that the cause ought to stand over, that the parties might proceed, in such manner as they should be advised, to have it determined by a competent jurisdiction, whether the power of attorney and release was binding on the appellants, or either of them, and whether the appellants, or either of them, were entitled to be relieved against the said power and release.

An order of the House having been made according to this report, a bill was filed in the Court of Chancery in Ireland, by the appellant Daniel, against the respondent Cahill and the appellant Roger, stating the circumstances of misrepresentation, fraud and duress; and further, that the appellant Roger, having discovered the fact, had revoked the power, and by a subsequent deed authorized the appellant Daniel to prosecute the appeal.

The respondent Cahill having put in his answer to the bill, and the cause being at issue by replication and rejoinder, witnesses were examined, and publication passed; and the appellant Roger, having also answered the bill, the cause was set down on pleadings and proofs, as against the respondent Cahill, and on bill and answer, as against the appellant Roger; and upon hearing, the instruments of disclaimer, and power of attorney, and an indenture of release of the 29th of October 1816, were declared fraudulent and void, so far as they affected the right of the appellant Daniel to prosecute the appeal in the names of the appellants; and it was ordered that the respondent Cahill should be restrained from using the said instruments on the hearing of the appeal, and that the appellant Daniel should be at liberty to use the name of the appellant Roger in prosecuting the appeal. The appellant Daniel was accordingly, on petition, admitted to prosecute the appeal.

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For the Appellants, *Mr. Wetkerell, Mr. Heald.*

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Argued

15, 27 June.

If the deed of settlement of 1743, the inhibition and other proceedings in Scotland, were not sufficiently put in issue in the pleadings, to intitle the appellants to read evidence of them on the hearing of the cause, yet, under the circumstances, and especially considering that the respondent had full notice of the settlement, and those proceedings, and had actually received 2,000*l.* under the provisions of the settlement; and as also witnesses had been examined on both sides in the cause, relating to the title of Roger Hamilton M'Neill to the estate in Scotland, and his right to dispose of that estate, the Court ought to have allowed the appellants, by supplemental bill, to put in issue the deed, inhibition, and other proceedings in Scotland.

Independent of the several matters relating to the sale of the estate of Taynish, and the right of the appellant, Roger Montgomery Hamilton M'Neill, to an account of the produce, there is sufficient evidence in the cause to intitle the appellants to a decree for setting aside the conveyance of the 28th of May 1789, made by the appellant Roger to the respondent Cahill, as fraudulent and void.

The agreement of the 17th of September 1801, cannot be considered of any avail in a court of equity, the same having been made between an insolvent debtor and his own assignee, to the prejudice of the general creditors of the insolvent.

For the Respondents, *Mr. Hart, Mr. Lynch.*

It appears, from the circumstances stated in the affidavit of the respondent Cahill, from the reference

ON APPEALS AND WRITS OF ERROR.

in the original bill, and the affidavit of the appellant Daniel, to the instrument releasing the 200^l. the portion of the respondent's wife, which instrument recited the marriage contract of 1743, and inhibition of 1769; from the interrogatories exhibited in the cause by the appellants, as to the marriage contract; from the circumstance of the settlement being in the hands of the appellant Roger's Scotch agent, Walter Moir, (a witness in the cause,) and his father, as well as other circumstances mentioned in his deposition; and from the deed of ratification of 1782, executed by the appellant Roger, to Colonel Campbell, the purchaser of the Taynish estate; that the appellant Roger must have known of the settlement of 1743, and the inhibition of 1769, or at least the former, long before the filing of the original bill. The settlement and inhibition were proved in the cause by the appellants. They must, or might therefore, have known of them before publication was passed. At the hearing of the cause, the appellants did not ask for leave to file a supplemental bill, for the purpose of putting those matters in issue in the cause, and suffered a final decree to be pronounced against them.

Upon inspection of the affidavit of the appellant Daniel, on the ground of which leave was in the first instance given to file a supplemental bill, it will appear that the prior knowledge of the marriage contract of 1743, and of the inhibition, is not unequivocally, or in fact at all denied.

As the appellant Daniel has not shown, or even stated himself to be interested in the question as to the Taynish estate, the affidavit, so far as it related

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to that estate, ought to have been made by the appellant Roger, and more particularly as from the age of the latter, and his having been conversant with the different transactions relating to the Taynish estate, which chiefly took place before the former was born, the appellant Roger was more competent to speak upon the subject of the affidavit. It does not appear that the appellants could gain any advantage by filing a supplemental bill, putting the marriage contract and inhibition in issue; since, if Roger, the father, had not a full power of disposition over the Taynish estate, the proper remedy of the appellant Roger is against the purchaser. If the appellant Roger were held to be entitled to recover against his father's estate, in respect of any part of the purchase-money, such recovery would be no bar to his remedy against the purchaser, and the estate of the father might ultimately become twice charged on the same account.

If the marriage contract were in issue in the cause, the appellant could derive no benefit from it, on account of the internal defects in the contract itself, and in consequence of his interference with the rents of the Raplock estate, during his father's lifetime, and now demanding a certain portion of them by his bill.

The respondent is released from all claims of the appellant Roger, in respect of the purchase-money of the Taynish estate, by a release and disclaimer made by him in the Scotch suit in 1789, which suit had reference to that purchase-money.

The appellant Roger, has not by any proof of *mistake*, or *surprise* in the *settlement of accounts* of

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17th September 1801; or by excepting to any item, or showing any error in the same, or for any other reason, shown sufficient grounds for avoiding that settlement of accounts, which was made after full opportunity had been given to the appellant Roger, to investigate those accounts, a statement of the respondent's claims having been in the appellant's, and his attorney's possession, and under consideration for eighteen months, and after he had, in fact, investigated them, as appears by the objections delivered to some of the items in the statement, which was made with the advice and assistance of the appellant's own solicitor, and by a deed prepared by that solicitor.

When an account was offered to the appellant by the Lord Chancellor at the hearing, on the foot of the second agreement of 1801, it was refused.

At all events, as the respondent has shewn that he gave a full and valuable *consideration* for the estate, the sale of the lands of Sheeplands, Loughmoney, and Carrowcarland, ought to be considered a valid sale, and ought not to be disturbed; and the more especially, after the repeated confirmations thereof by the appellant Roger, during an interval of nearly twenty years, between the sale and the filing the bill.

The appellant Roger, has shown no ground whatever for his impeachment of the lease of Dunseverick Mountain farm, and the same ought not to be disturbed*.

* Upon the several points discussed on the hearing of the appeal, see the following authorities: as to reading evidence of matters not put in issue by the pleadings, *Clark v. Turton*, 11 Ves. 240.—That evidence of a distinct fact, as a declaration by an auctioneer, cannot be read without an allegation in the record, *Smith v. Clark*,

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The *Lord Chancellor* and *Lord Redesdale*, in the course and at the conclusion of the argument, made the following observations.

The first settlement followed by the recovery, the uses of which are declared by the deed, is different in its limitations and provisions from the second settlement, and by the operation of the registry act, becomes void as against the second, which, although subsequent in date was first registered. It is material to consider whether the first settlement was not a fraud. It is admitted, that the whole income of the lands settled, did not exceed 234*l.* per annum. By the settlement, the father is to take 500*l.* the fortune of the intended wife. Then debts, to the amount of 1,800 *l.* are to be charged on the (Dunseverick) estate, of which only 250 *l.* was the proper debt of the son; all the rest was the debt of the father only, or of the father as principal and the son as surety. After this provision, an annuity of 200*l.* is to be paid to the son for present maintenance, and the residue is limited to the father for life, with remainder to the son in tail. It is clear from the statement of the rental of the

11 Ves. 477.—As to the right to amend, or file a supplemental bill, or bill of review, *Jones v. Jones*, 3 Atk. 217; Red. Treat. on Pleading, 49. 66. 263; *Boeve v. Skipwith*, 2 Ch. Rep. 142; Eq. Ca. Abr. 79; *Goodwin v. Goodwin*, 3 Atk. 370; *Ludlow v. Macartney*, 2 B. P. C. 104; *Norris v. Le Neve*, 3 Atk. 25, 34; *Young v. Keighley* 16 Ves. 348.—As to the account, *Drew v. Power*, 1 Sch. and Lef. 182.—As to acquiescence by *cestui que* trust, in an agreement with his trustee, *Campbell v. Walker*, 5 Ves. 678, (citing *Price v. Byrne*), *Webb v. Rorke*, 2 Sch. and Lef. 672; *Medlicott v. O'Donnell*, 1 Ball & Beatty, 156.—As to length of time as a bar to inquiry, *Chambers v. Bradley*, Jac. and W. 51.

estate made in the respondent's case, not only that there could be no residue, but that there could not be enough to pay half the annuity provided for the son. The father of the intended wife is said to have been dissatisfied. No person in his senses could be satisfied with such a settlement. It was in fact no settlement at all; the whole nearly of the rental or value would have been swallowed by the provision for debts.

A second settlement is then made, to which the father is not a party, and this, it is contended, is a fraud against him. In fact, the whole transaction appears to have been fraudulent on all sides, the father deceiving the son, and the son deceiving the father. The first deed is a delusion upon the face of it: the son permitting the debts of the father to be charged on his interest in the estate, without adequate consideration; the annuity of 200 l. being postponed to incumbrances, which would almost exhaust the estate, can hardly be deemed a consideration. The debts of the son, which form part of the charge, might have been paid out of the portion of his intended wife. That portion was taken by Roger the father. It was paid to him by the bond of the wife's father, by collusion between the parties, to the second settlement, to induce him to believe that the first settlement was in existence and operation, a device which was so far successful, that for many years afterwards he did not discover the registry of the second settlement.

Lord Redesdale, in moving judgment, after stating the facts of the case, proceeded to make observations to the following effect:

17 July
1820.

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The schedule to the indenture of settlement of the 15th of October, contained one debt owing by the appellant Roger M. H. M'Neill, amounting to 250*l.*; the rest were properly the debts of Roger the father. According to the terms of this instrument, the debts charged on the lands amounted to 1,800*l.* principal money. The annuity of 200*l.* payable to Roger the son, for maintenance during the life of the father, was an additional and subsequent charge. It must have been the understanding of the parties, that the estate was of sufficient value to satisfy the debts, to pay the annuity for maintenance, and leave a surplus. It is a very informal, ill-worded deed, but that is the effect of it, as the agreement of the parties.

The articles of the 25th of October were registered before the deed of the 15th of October, and the priority of registry, both in law and equity, gives a priority to the instrument so registered, though subsequent in date and execution. But the deed nevertheless binds the appellant Roger, as his agreement. So far as the two instruments are inconsistent, he is bound personally by the deed. The parties are responsible, therefore, by that their agreement for the debts mentioned in the schedule; they must be paid according to the trusts created for the purpose; and as the appellant Roger thus made his estate liable for the payment of those debts, so he became entitled to the benefit of that instrument as against his father, who thereby, as it must be intended, undertook that the estate was sufficient to answer the charge. Upon any other supposition the transaction would be unfair and fraudulent; for Roger the father, taking the por-

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tion of the son's wife, gives an estate inadequate to the purpose intended and professed. In consequence of such inadequacy, the limitation to the issue, for which in fact the consideration was given, might have been wholly or partially defeated. The parties, therefore, who executed, had, under this instrument, mutual demands, which were personal so far as it was inconsistent with the posterior settlement: the son to make good to the father the payment of the debts; the father to establish for the son the income thereby provided for maintenance, and the limitations to the issue.

Under these circumstances, Gillespie, the trustee named in the first indenture, took possession of the estate, and paid to the son the annuity of 200*l.* provided by that instrument, but did not keep down the interest upon the scheduled debts, either of the debt of the son, or of those owing by the father and son jointly, in which the son was a surety for the father. In settling the accounts, the father was to be charged with so much of the debt as he did not pay out of the rents of the estate. The father had also paid money in discharge of the debts of the son; and the debtor and creditor account between them remained unadjusted at the period of the father's death.

Upon the death of the father, the respondent Cahill became entitled under the will, and in right of the father, as his executor, to demand the debt owing to his estate from the son. A claim for these debts was made in the year following the father's death. In the account stated by the respondent Cahill, he charges the son with the debt to Gil-

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lespie, and the interest upon it, amounting to 990*l.*; the whole of which, except 45*l.* had accrued during the life of the father. Another charge, to the amount of 276*l.* 19*s.* 5½*d.* is made in respect of disbursements appearing by Gillespie's account. There is also charged a debt owing to Sir Patrick Hamilton, which was the debt of the father alone, with interest upon that debt to September 1788. The account contained other charges of sums with interest, which were the debts of the son discharged by the father. The last item in the account was the amount of a legacy, with interest, which was charged on the Newgrove or Ballylesson estate, of which the son became tenant for life on the death of the father, and as such bound to keep down the interest of the legacy. The whole charge in this account amounted to 4,529*l.* 18*s.* 3*d.* which the respondent Cahill, as the executor of the father, demanded against the son. It is clear that much of this was no debt of the son. The interest upon the debts, for example, which accrued in the lifetime of the father, ought to have been satisfied out of the rents; but after paying the annuity provided for maintenance of the son, they did not produce sufficient to pay the interest accruing upon Gillespie's debt.

The demand, therefore, made upon Roger the son by the respondent Cahill, as executor of the father, was excessive. It rested upon insupportable charges, and he took no notice of the claims of the son upon the father, in respect of monies received by him from the purchaser of the Taynish estate. Admitting that the father was entitled to sell that

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estate, he was answerable for the value. The son had affirmed the sale by executing the deeds: but this was a matter not in the contemplation, or not taken into the consideration of the parties at the settlement of the accounts.

Upon such a state of transaction between the parties, the respondent Cahill contracts with the appellant Roger the son for the purchase of Sheeplands. It is admitted that the consideration was not actually paid; but upon the conveyance, a receipt was signed by the appellant Roger, for the consideration, as part of the debt alleged, and in the transaction supposed to be due, from the son to the father. Whether it was really a consideration must depend upon the state of the account. The bill impeaches the transaction of the sale itself, but not on sufficient ground, supposing the purchase-money to have been, as alleged, a debt from the son to the father. Assuming the account to be correct, or the consideration actually paid, the transaction of sale was proper and fair.

The claim made by the son against the father as to the Taynish estate, is very imperfectly stated in the pleadings. The son, it seems, had at least a right to demand the value of the estate against the father.

It appears, that in 1791 the son became embarrassed, and was discharged under the Irish act 31 Geo. III. as an insolvent debtor. Various creditors had by process of law obtained possession of different parts of his estate; and several persons having been from time to time appointed assignees, the respondent Cahill finally became assignee of his estate and effects. After this appointment, a transaction of agreement took place between the respon-

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dent Cahill, and the appellant Roger, in which upon the old statement of account as to the debt supposed to be owing from the son to the father, to the amount of 3,000 l., and an arrangement by which 1,300 l. was to be accepted in full of the demand, it was agreed that the respondent Cahill should have the Ballylesson estate, to pay out of the rents and profits an annuity of 227 l. 10s. to the insolvent, 120 l. to his wife, and then to apply the residue in discharge of the 1,300 l. owing to the assignee himself.

This is a transaction which a court of equity cannot countenance or suffer on the part of the assignee of an insolvent debtor. It is a contrivance to provide for the family of the insolvent, and the assignee as one of his creditors, at the expense of the other creditors. On grounds of public policy, it is necessary to declare that such an instrument is void. It is a deed contriving a fraud against creditors, to which a trustee for them is a party.

The bill in this case was filed by the appellant Roger, to investigate the transactions between him and the respondent, to which fraud is attributed; but I do not enter into the question in that point of view. The bill prayed that various accounts might be taken; that the agreement and conveyance mentioned in the pleadings might be set aside; and a reconveyance. It is a very confused and inaccurate bill.

At the original hearing, which took place in 1816, it was objected that Leslie, who had in the meantime been appointed assignee, was not a party, and leave was given to amend the bill.

When the cause came before the Court upon further hearing, the deeds of 1743, being the settlement of the Taynish estate, and the proceedings in

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Scotland, were offered in evidence. It was objected that there was no allegation in the bill to warrant the production of such evidence, and the objection was held valid by the Court. A petition was then presented, praying leave to amend the bill, or to file a supplemental bill, for the purpose of supplying the defect. The prayer of that petition was properly refused, and afterwards the bill was dismissed with costs.

The subsequent proceedings in the cause it is not material to state or discuss.

The appeal raises the question, what ought to have been done in the cause under these circumstances. When the hearing took place in the Court below, the respondent Cahill offered to account on the foot of the deed of 1801; that was an offer in affirmance of the deed. The Court held, that because the plaintiff, (the appellant Roger,) had refused that offer, the Court would not direct the account; but whether he accepted or refused, if the Court were of opinion that the deed of 1801 was binding upon the appellant Roger, it was the duty of the Court, without regard to the sentiments of the parties, to direct the account. On the footing of that deed, the respondent Cahill was clearly responsible in account; it is therefore difficult to understand why the bill was dismissed.

This is an error which makes it necessary for the Court of Appeal to interfere.

The effect of the transaction in 1777, was to constitute the father and son mutually and personally creditors and debtors to a certain extent. The father was bound to make good to the son the annuity provided by the deed, and the interest of the

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debts charged on the estates; otherwise the deed was a fraud on him and the persons to take, subject to the charges. The issue of the marriage might have had nothing. According to the true intent of the deed of the 15th October 1777, the parties executing became mutually and personally debtors, so far as the deed could not have the effect contemplated or professed, by means of the estates conveyed.

At the date of the father's death, it is clear that the account was pending and unsettled. When that account came to be settled between the son and the representative of the father, the actual state of debts and credits on each side ought to have been investigated; whereas, all the debts were charged upon the son, and the son was not made creditor upon the estate of the father, for interest accrued in the lifetime of the father, and upon his own debts, which were charged upon the estate.

Omitting all consideration of the question as to the Taynish estate, it is impossible to hold, that the account so taken was fairly taken between them. In the account there are sums charged as paid by the father for the son. Great part of this demand was constituted by agreement between the father and the son, and looking at the will of the father, it is difficult to hold, that he intended these sums should be charged against the son as debts: the terms of the will raise considerable doubt as to that point. If there was any demand arising out of the sale of the Taynish estate, that was not taken into account in the settlement. The whole amount of the bond to Gillespie is charged in the account against the son, although 392*l.* 9*s.* 7½*d.* of the amount was not paid by the father, but by the son after his death.

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So, as to the interest accrued in the life of the father, it was improper, and not according to the contract between the parties, charged in account against the son. The case is the same as to the debt to Sir Patrick Hamilton. It appears, therefore, that an erroneous account is the foundation of all the subsequent transactions between the parties.

Justice requires that the account should be investigated, to ascertain how far the son was indebted to the father; and, considering the question as to the produce of the Taynish estate, whether the estate of the father was not indebted to the son.

The account, which is the foundation, being erroneous, the subsequent transactions, so far as they depend on the account, must be subject to investigation. It will require much consideration in framing the order. The House must declare what was the true right between the parties when the account was settled and acted upon. The transaction of 1801, cannot stand. The case must be reviewed by the court below. There must be an investigation as between debtor and creditor. The question, as to the lease being, I suppose, of no value, was abandoned at the bar. As to the Taynish estate, if the appellant Roger, has a right against the estate of the father to call for an account of the value, I doubt whether it can be admitted in this suit. If not ~~put in~~ issue by the bill, it cannot be the subject of decision here.

As to that part of the case, the bill may be dismissed, without prejudice to any other suit which the appellant may be advised to institute.

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ORDERED and adjudged, that the decree complained of be reversed: And it is declared, that the deed bearing date, the 14th October 1777, making the tenant to the *præcipe*, and declaring the uses of the recovery suffered in Trinity term 1778, and the deed dated the 15th August 1777, purporting to be a settlement previously to the marriage of the appellant Roger Montgomery Hamilton M'Neill and Catherine Chambers, the father and mother of the appellant Daniel M'Neill, ought to be deemed personally binding, both upon the appellant Roger Montgomery Hamilton M'Neill, and Roger Hamilton M'Neill, deceased, father of the said appellant, notwithstanding the said deed of the 15th October 1777, was not executed by the said Catherine Chambers and Daniel Chambers her father, and was not registered until after the deed of settlement of the 25th October 1777, in the pleadings mentioned, was registered; but so far only as the said deed of the 15th October 1777, may be deemed just and reasonable, as between the said Roger Hamilton M'Neill, deceased, and the appellant Roger Montgomery Hamilton M'Neill, his son, attending to all circumstances: And it is further declared, that according to the true intent and meaning of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, was entitled to have the debts mentioned in the schedule thereto, to which he was liable, charged on the estates comprised in the said deed, so far as the appellant Roger Montgomery Hamilton M'Neill, his son, had any interest in such estates, after the execution of the said deed of the 25th October 1777; and the appellant Roger Montgomery Hamilton M'Neill was entitled to have the debts due from him, as stated in the said schedule, also charged on the said estates; and he was also entitled to the several annuities provided for him, and particularly to the annuity of 200 l. a year, provided for his immediate maintenance: and inasmuch as it appears that the rents and profits of the lands comprised in the said deed of the 15th October 1777, were inadequate to the payment of the said annuity of 200 l. provided for his immediate maintenance, and the interest of the debts stated in the schedule to the said deed, and thereby intended to be charged on the said estates, the said deed ought to be taken to have been so far entered

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into by the said appellant, Roger Montgomery Hamilton M'Neill, under a mistake or misrepresentation of the annual value of such estates; and therefore, and inasmuch as the said Roger Hamilton M'Neill, deceased, received the portion of the said Catherine Chambers, according to the terms of the said deed of the 15th October 1777, the said Roger Hamilton M'Neill, deceased, ought to be deemed to have been a debtor to the said appellant Roger Montgomery Hamilton M'Neill, his son, for the amount of such portion, so far as to give said appellant the full benefit of such deed on his part, both with respect to the said annuities and the payment of his own debts mentioned in the schedule to such deed; and the said appellant ought to be deemed a debtor to the estate of his father, the said Roger Hamilton M'Neill, deceased, in respect of so much of the principal of the debts of his said father, mentioned in the schedule of the said deed, as were paid by his father, but not for the interest thereof, nor for the interest of his own debts mentioned in the schedule to the said deed, during the life of his said father, if any interest was paid by his father, but on the contrary, the said appellant ought to be deemed a creditor on the estate of his said father, for so much of all such interest as was paid by the said appellant; and the said appellant ought to be deemed to be a creditor on the estate of his said father, for so much of the interest of his own debts mentioned in the said schedule, which accrued during the life of his said father, as was not paid by his father; and that therefore the demand made upon him by the respondent Michael Cahill, as representative of the said Roger Hamilton M'Neill, deceased, the father of the said appellant, ought to have been made accordingly, subject nevertheless to the question, whether on any other account the said appellant Roger Montgomery Hamilton M'Neill had any demand against the estate of the said Roger Hamilton M'Neill, deceased, his said father: And it is further declared, that the demand made by the respondent against the appellant Roger Montgomery Hamilton M'Neill, by which he claimed the sum of 4,529*l.* 18*s.* 9*d.* as due from the said appellant to the estate of the said Roger Hamilton M'Neill deceased, for principal and interest, calculated to the 10th September 1788, was therefore founded on mistake, and that it appears to have

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been erroneous in other particulars, independent of any question whether the appellant Roger Montgomery Hamilton M'Neill was entitled to make any demand against the estate of his said father; in respect of the money for which the estate in Scotland, called the Taynish estate, was sold: And it is further declared, that such question was sufficiently put in issue by the said appellant's bill, and by the answer of the respondent Michael Cahill to such bill, to warrant an inquiry, whether any part of the principal or interest of any of the debts, mentioned in the schedule to the said deed of the 15th October 1777, which were paid in the lifetime of the said Roger Hamilton M'Neill, or after his death, was so paid out of the money arising by sale of the said Taynish estate; and whether what was so paid ought to have been demanded by the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against his son the appellant; and also, whether the said appellant had, in respect of such money arising by sale of the said Taynish estate, such demands against his said father's estate, as were equal to, or might in any manner reduce the claim which the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, might otherwise have had against the said appellant; to the end that it might be ascertained, whether upon a just and fair settlement of accounts between the said appellant and the estate of his said father, the said Michael Cahill as executor as aforesaid, had on the 10th September 1788, a just demand against the said appellant to the amount of 4,529 *l.* 18 *s.* 9 *d.* or any other, and what sums of money: And it is further declared, that it does not appear that there are sufficient grounds for impeaching the sale made by the said appellant to the respondent, of the lands of Loughmoney, Carrowcarland and Sheeplands, conveyed to the said respondent by the deed of the 20th May 1789, in the pleadings mentioned; but it being admitted, that the purchase money for the said estate was not paid, except by setting against the same the demands made by the respondent, as executor of the said Roger Hamilton M'Neill, against the said appellant, but for which no discharge was then given by the said respondent to the said appellant; the said appellant ought to be deemed to have a lien on the said estate for the purchase money; and the said respondent ought to be deemed a debtor to the said appellant, for

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so much of the purchase money, if any, as would not at the time of the purchase have been satisfied by the just demands of the said respondent, as executor as aforesaid, against the said appellant, and all other demands of the said respondent, at that time against the said appellant: And it is further declared, that the deed of the 17th September 1801, having been entered into by the appellant Roger Montgomery Hamilton M'Neill, under the influence of the prior transactions between him and the respondent, and the said respondent being then assignee of the estates and effects of the said appellant, under the authority of an act for the relief of insolvent debtors, and such deed containing a contract on the part of the said respondent, for the benefit of the said appellant, which was a fraud on the other creditors of the said appellant, who might have sought relief against him under the said act: It is declared, that the said deed of the 17th September 1801, ought to be set aside as fraudulent, with respect to the said appellant, and void on principles of public policy: And it is further ordered, that it be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account between the said appellant and the said respondent, as executors of the said Roger Hamilton M'Neill, deceased, the said appellant's father, according to the declarations hereinbefore contained, and to state the same as it ought to have been stated, according to the declarations aforesaid, on the 10th September 1788, the time to which the interest was calculated, according to the account set forth by the said respondent, in his answer to the said appellant's bill; and that the said Master do ascertain what sum, if any, was actually due from the said appellant to the estate of his father, on the said 10th September 1788; in taking which account, the Master is to have regard to the several declarations hereinbefore contained, and also to enquire whether any, and which of the debts of the appellant, paid by his father, were paid by his father with intent to create, by such payment, a demand against his said son, or with any other, and what intent; and the said Master is also to have regard to the claims of the appellant against his said father, in respect of the money raised by sale of the Taynish estate: And for that purpose it is further ordered, that the said Master do enquire what were the rights and interests of the said Roger Hamilton M'Neill,

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deceased, the said appellant's father, in the said Taynish estate; and whether the said appellant had, according to the law of Scotland, any demand against the estate of his said father, in respect of the money raised by sale of the said estate, and what was the nature of such demand: And it is further ordered, that the said Master do state the amount of the just demands of the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against the said appellant, for principal and interest on the said 10th September 1788, and also on the 20th May 1789, the date of the conveyance of the said lands of Loughmoney, Carrowcarland and Sheepland, without including any demand of the said appellant, in respect of the money arising by the sale of the said Taynish estate: And that the said Master do also state distinctly the nature and extent of the demands of the said appellant, if any, against the estate of his said father, in respect of the money raised by sale of the said Taynish estate, and all dealings and transactions respecting the same; and that the said Master do also state the just amount of the demands of the said respondent, as executor of the said Roger Hamilton M'Neill, deceased, against the said appellant, on the said 10th September 1788, and also on the said 20th May 1789, taking into such account all demands of the appellant against the estate of his father, in respect of the money raised by sale of the said Taynish estate, so far as the same may extend to balance the amount of the just demands of the said Michael Cahill, as executor as aforesaid, against the said appellant: And it is further ordered, that the said Master do take an account of all dealings and transactions between the respondent, in his own right, and the said appellant, and of all demands of the said Michael Cahill against the said appellant in respect thereof, considering the said deed of the 17th September 1801, as null and void, and not binding on either of the parties thereto; and state the amount of the balance, if any, due from the said appellant to the said respondent, independent of his demands as executor; in taking which account, the said Master is to give the said appellant credit for so much, if any, of the sum of 3,500*l.* the purchase money for the Loughmoney, Carrowcarland and Sheepland estate, as was not exhausted by any debt due from the said appellant to the estate of his said father on the 20th May 1789, the date of the con-

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veyance of such estate: And it is further ordered, that the said Master do state such account between the appellant and the said Michael Cahill, in his own right, according to the direction aforesaid, taking into consideration the demands of the said appellant in respect of the Tainish estate; and also without taking into consideration such demands: And, in case the said Master shall find, on taking such account in either way, that the whole or any part of the sum of 3,500 ^l. the amount of the purchase money aforesaid, was not on the 20th May 1789, due from the said appellant to the estates of his said father, it is ordered, that the Master do compute interest on the whole, or on the balance, as the case may be, at the rate of interest demanded against the said appellant on the accounts before directed: And it is further ordered, that the said master in stating the accounts between the said respondent in his own right, and the appellant, do give the appellant credit for such principal money and interest: And it is further ordered, that all further directions be reserved until after the said Master shall have made his report: And it is further declared, that the said appellant hath not by his said bill, sufficiently put in issue his rights against the estate of his said father, if any he has, with respect to the money arising by sale of the said Tainish estate, beyond the right to have such demands as may arise therefrom set against demands made against him as debtor to his father's estate, as hereinbefore directed: And it is therefore ordered, that the said appellant's bill do stand dismissed, so far as it claims any surplus of the money raised by sale of the Tainish estate, beyond the demands of the said Michael Cahill, as executor of the said appellant's father against the said appellant, but without prejudice to any suit which the said appellant may be advised to institute concerning the same.

A

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION,
(First Division.)

JOHN GEDDES - - - - *Appellant*;
ARCHIBALD WALLACE, for Him- }
self and Partners - - - - } *Respondents.*

The manager of a partnership concern, having a salary, with a share of the profits, according to a proportion of capital and stock not advanced by him, but assigned by way of nominal interest, (for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill and industry,) is not a partner subject to loss in account with the other partners.

In such a case the manager is not liable for loss, although it is expressed in the articles of partnership that the partners (not excepting the manager,) are to be "subject to profit and loss," and although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution; because it appeared, from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties and the conduct of the other partners, that the provision as to profit and loss was not intended to apply to the manager.

If it were so intended originally, it could not be enforced at the date the suit commenced, because the other partners, upon the dissolution of the partnership, and for many years afterwards, made no mention of the subject, and particularly as in a former suit between them and their manager respecting the amount of his salary, they omitted to make any claim against him as partner for a share of loss; and more especially as the Court below, and the House of Lords on appeal in that suit, estimated the salary on the supposition that

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the manager was entitled to a share of profit as an addition to his salary, without being subject to loss, no mention or claim having been made on that subject, either in the original suit in the Court below, or upon appeal.

A partner may be liable for loss as to the creditors of the partnership, and not so as to his copartners.

The most positive expressions as to liability to loss, in articles of copartnership, may be controlled and superseded by transactions between the parties, the conduct of the copartners, and the special circumstances of the case, including non-claim, and inconsistent representations during a protracted litigation, which furnished occasion to make the claim if the right existed.

The transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement, different from written articles, provided those transactions show a probability, amounting almost to demonstration, that the articles were otherwise intended.

IN September 1785, the firm of "The Glasgow Bottlework Company," having lately purchased the concern in which the appellant was manager, retained the appellant in his situation, and agreed to allow him a fixed salary of 100*l.* per annum, with a thirteenth share of the free profits of the trade, not requiring him to advance any capital.

Soon after the establishment of the bottlework company, a proposal was made to them by "Hamilton, Brown, Wallace, and Company," manufacturers of flint glass at Verreville, Glasgow, to unite into one company; and in June 1786 a partnership was formed, which assumed the denomination of "The Glasgow Glasswork Company." The nature of the connection between the appellant and this company forms the subject of the present appeal.

The superintendence of the manufacturing department, both of the bottlework and of the flint

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glasswork, and the general management of the concern, were intrusted to the appellant. The mercantile and pecuniary transactions of the new company were directed chiefly by a committee, consisting of four of the partners.

The new company did not immediately upon their formation execute a written contract of co-partnership. In the mean time the committee held meetings for the purpose of conducting the business, and inserted their resolutions and orders in a sederunt book. The appellant attended them to receive instructions as manager, and subscribed some of the minutes in the book.

Articles of
partnership,
1786.

The contract of co-partnery*, which was subscribed by the appellant, declares that the stock of the Glasgow glasswork company was to be 12,000*l.*; of which 8,000*l.* was to be advanced, and 4,000*l.* was to be borrowed. Eight shares were to belong to the partners of the bottlework company; eight shares were to belong to Hamilton, Brown, Wallace, and company; and the appellant was to have one seventeenth share, without advancing any capital.

The article, by which this arrangement is made, is expressed thus: "Third, In the said capital stock of 12,000*l.* sterling, the *partners* shall be interested in the profit or loss in the following proportions; viz. the partners under the firm of Glasgow bottlework company eight seventeenths; and the partners under the firm of Hamilton, Brown, Wallace, and company, eight seventeenth

* To avoid repetition, some of the provisions of the articles of copartnership, which are stated by the *Lord Chancellor* in moving judgment, are omitted here.

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“ shares; and the said John Geddes one seven-
“ tenth share.”

The ninth article provided, that “ the company’s
“ books shall be balanced upon the 31st day of De-
“ cember yearly, and docqueted in three months
“ thereafter, beginning the first balance upon the
“ 31st day of December 1787, when the company’s
“ free stock shall be ascertained, which shall then,
“ and yearly thereafter, be subscribed by a majority
“ of the partners in point of interest; and which
“ docqueted balance shall be held good and proba-
“ tive for and against all parties concerned.”

The fifteenth article declared, that “ although,
“ by this contract, the said John Geddes is admitted
“ a partner, and holds one seventeenth share in this
“ company, yet, it is expressly declared and under-
“ stood to be under the conditions and restrictions
“ more particularly specified in an agreement of this
“ date, made and entered into between him and the
“ company, and to which all the parties hereto bind
“ and oblige themselves to conform.”

The contract, towards the close, contains the fol-
lowing declaration: “ That although, by the eigh-
“ tenth and eleventh articles of the foregoing con-
“ tract, certain rules and regulations are laid down
“ for the payment of the shares of deceasing or
“ bankrupt partners, yet, notwithstanding thereof,
“ it is specially covenanted and agreed to by the
“ whole parties hereto, that the stock or interest in
“ this co-partnery of deceasing or bankrupt partners
“ shall not be paid to their executors or creditors
“ by this company, but that the same shall fall and
“ devolve upon the remanent partners, of whichever

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“ of the said Glasgow bottlework company, or
 “ Hamilton, Brown, Wallace, and company, they
 “ may respectively be partners; which respective
 “ companies shall be entitled to hold and enjoy the
 “ said shares, and settle with the executors or cre-
 “ ditors of such deceasing or bankrupt partners,
 “ according to the rules of their own co-partnery.”

The agreement, stated in the fifteenth article of the contract, was drawn up, but not signed by the appellant or the other partners.

This agreement, among other things, provided,
 1st, “ That the said John Geddes shall take the
 “ management and direction of the business of the
 “ company, for which he shall be allowed the sum
 “ of 100*l.* sterling yearly out of the company’s stock
 “ during his management, *besides* his one seven-
 “ teenth share *of the profits or loss* arising from
 “ the business, if any be, as likewise the house
 “ usually occupied by the company’s manager,
 “ and coals and candles for his family: 2d, In
 “ consideration of which the said John Geddes
 “ shall devote his whole time and attention to the
 “ affairs and business of the company, and keep
 “ such regular books and accounts as necessarily
 “ belong to the business of his department, and
 “ which shall be open to the inspection of the part-
 “ ners at all times; that he shall likewise engage or
 “ cause to be made all the pots necessary for the
 “ business; and in short, he hereby engages to do
 “ whatever else may be required of him for the
 “ interest and advantage of the company: that he
 “ shall at all times subject himself to such orders
 “ and regulations as a majority of the partners in

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“ point of interest may think fit to give him ; and
 “ he hereby further promises and engages, that he
 “ will not be concerned in any other trade during
 “ the time of his acting as manager for this com-
 “ pany. 3d, It is hereby specially provided and
 “ declared, that it shall and may be competent at
 “ all times, to and in favour of a majority of the
 “ partners of the said company in point of interest,
 “ in case of difference, at pleasure to supersede the
 “ said John Geddes as manager, and to appoint
 “ another in his stead, upon giving him six months
 “ previous notice ; or in the company’s option, in-
 “ stantly to supersede him upon paying him 200 l.
 “ sterling ; and likewise that the said John Geddes
 “ shall at all times have it in his power to leave the
 “ said company’s service, on giving them six months
 “ previous notice ; and in either of these events, of
 “ his being so superseded or leaving the company’s
 “ service, he shall from that time cease to be a part-
 “ ner in the said company, and shall be obliged to
 “ assign over his share to the other partners, upon
 “ being paid the value thereof in manner after men-
 “ tioned. 4th, In case the said John Geddes shall,
 “ during the subsistence of the before mentioned
 “ co-partnery, be superseded in the management
 “ aforesaid, his share shall be withdrawn by him or
 “ his assigns, agreeable to the balance struck imme-
 “ diately preceding his dismissal, which shall be
 “ payable to him or them in two equal portions, at
 “ the distance of three and six months from the
 “ time of his leaving the work, and settling with the
 “ company the accounts of his intromissions, with
 “ the legal interest thereof from the date of such

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“ balance till the same is paid ; and in the event of
 “ his death or bankruptcy during the currency of
 “ this agreement, his share shall be paid to his exe-
 “ cutors or creditors, at the times and by the propor-
 “ tions, and bearing interest in the same manner,
 “ as is mentioned in the contract of co-partnery itself
 “ of this date, in the article with regard to the
 “ death of any partner.”

Part of the appellant's duty originally as manager, was to keep the books personally ; but in September 1787, the minutes of the committee of management state, that as the appellant had too much to do, it would be expedient to get a man “ who would take
 “ charge of the mercantile part of the business, such
 “ as the writing of letters, making out invoices, taking
 “ care that orders were properly and expeditiously
 “ executed,” &c. so as to leave the appellant full leisure to attend to the manufacturing part of the business. In pursuance of this resolution, a clerk was employed to keep the books and attend to the mercantile part of the business, as an assistant to the appellant.

In the balance book of the company, where the balance sheets of each year were entered and docqueted, were docquets dated 15th April 1789, 12th March 1790, 17th March 1791, and 3d April 1792 ; the three last were signed by the appellant, and express that the partners then “ examined the
 “ books of the Glasgow glasswork company, kept by
 “ John Geddes,” &c.

The capital consisted of buildings, tools, and stocks of manufactured glass, belonging to the two former companies, which were purchased or taken by the united company, according to inventories and

upon a valuation. To carry on the trade, money was borrowed on their joint bonds.

When the stock of the company was fixed, and the inventories and valuations made, accounts were opened in the ledger for the shares of stock belonging to the different parties interested. The plan being that the bottlework company and the flint glass company should rank as creditors on the funds and profits or losses; eight seventeenths of the stock were entered in a stock account to the Glasgow bottlework company; eight seventeenths to the flint glass company, Hamilton, Brown, Wallace, and Co.; and the remaining one seventeenth to the appellant.

A stock account was opened for him at the first valuation, crediting him with one seventeenth share of the stock, which then was 625*l*. This sum was not advanced by Mr. Geddes, though credited to him in the stock account; there was therefore a second account opened, viz. a common stock account current, in which the preceding share of stock was stated to his *debit*.

In December 1788, upon a balance of the books, there was an apparent profit of 1,475*l*. 10*s*.; but the balance book states, that as no allowance had been made for bad debts, and as the buildings were stated rather high, the company ordered a deduction to be made from the valuations of the whole, to the amount of 2,626*l*. This made a loss on the balance of 1788, of 1,151*l*. 5*s*. 10*d*.; and Mr. Geddes' one seventeenth of that loss, 67*l*. 14*s*. 5*d*. is charged to his *debit*, but he did not sign the docquet, although he acquiesced in the arrangement.

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28th Sept.

1790.

Minutes in
company's
sederunt book
as to shares,
and profit and
loss.

On the 28th of September 1790, a minute was entered in the sederunt book, dividing the shares into eighty-five parts, and mentioning the number of shares opposite to the names of each of the partners. Mr. Geddes' share is entered thus: "To John Geddes 5-85ths." His name is entered on the list like those of the other partners, after which the minute proceeds as follows: "In which proportions we declare ourselves to be interested, and to *draw profit or suffer loss* accordingly; and in case of the death or bankruptcy of any of the partners, the share of such deceased or insolvent partner shall fall in and belong to the company in general, agreeable to the manner as specified in the contract of co-partnery, in every respect, except in belonging to the particular company to which said partner originally belonged, which is hereby in so far altered. In witness whereof, &c."

This minute was signed by the appellant.

1790.
March 12,
Minute as
profit then
made.

In 1790 the books were balanced. They showed a supposed profit of 1,055*l.* 4*s.* 4½*d.*; and the docket at this balance, which was also signed by the appellant, is in the following terms. "At Glasgow, the 12th day of March 1790: We subscribers, all partners in trade, buildings, and other effects contained in this and the other books belonging to the concern carried on under the firm of The Glasgow Glasswork Company, as kept by our partner, Mr. John Geddes, and the clerks under him; having examined the said account books and inventories, as made up to the 1st day of January last, find the same to be fairly stated, and brought to a balance, and that the profit for last year amounts to 1,055*l.*

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“ 4s. 4 $\frac{1}{2}$. sterling, and the stock of said company
 “ to 9,473 *l.* 14s. 2*d.* sterling. We hereby order,
 “ that the 1,055 *l.* 4s. 4 $\frac{1}{2}$ *d.* sterling, profit for last
 “ year, be added to the amount of the stock, which
 “ makes it now amount to 10,528 *l.* 18s. 6 $\frac{1}{2}$ *d.*
 “ sterling; and declare for ourselves, our heirs, exe-
 “ cutors, and successors, that in case of the death or
 “ bankruptcy of any of us before next balance, we are
 “ to draw our proportion of the foresaid funds accord-
 “ ing to the above balance, at the terms and in the
 “ manner specified in the contract of co-partnery.”

The docquet entered immediately before the dis-
 solution of the company, which is also signed by Mr.
 Geddes, was to the following effect: “ At Glasgow
 “ the 3d day of April 1792: We, James Dunlop,
 “ &c. and John Geddes, all merchants in Glasgow,
 “ and partners in the business carried on here under
 “ the firm of the Glasgow Glasswork Company hav-
 “ ing examined the books of the said company (kept
 “ by John Geddes) from the 1st day of January 1791,
 “ to the 1st of January last, find the same to be fairly
 “ entered and stated, and brought to a balance as
 “ above, and on the thirteen preceding pages: that
 “ the capital of the company amounts to 11,166 *l.*
 “ 10s. 5*d.* sterling, which belongs to the partners
 “ according to their respective shares, narrated in
 “ sederunt dated the 28th day of September 1790.
 “ That the property and debts belonging to the com-
 “ pany amount to 23,387 *l.* 1s. 8*d.* sterling, the debts
 “ due by the company amount to 11,778 *l.* 1s. 6*d.*
 “ and the neat profit for said year to 442 *l.* 9s. 9*d.*
 “ sterling. We hereby order that 53 *l.* 9s. 7*d.*
 “ of the sum gained be applied to the credit of

1792, April 3d.
 Docquet im-
 mediately prior
 to the dissolu-
 tion of the
 company.

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“ the different partners, according to their respective
 “ interests, and the remaining sum of 389*l.* 0*s.* 2*d.*
 “ towards the credit of a sinking fund, to answer for
 “ bad debts and discounts &c. And we also agree, that
 “ in case of the death of any of us before the end
 “ of the contract, or winding up of this concern, that
 “ our heirs, executors, or assignees shall be liable
 “ to sustain any loss and entitled to any profit that
 “ may be applicable to the share of such deceased
 “ partner during that time. In witness whereof, &c.”

In the year 1792, the Dumbarton Glasswork Company having made an offer to purchase the whole buildings and property of the company, it was resolved to accept of the offer, and to dissolve the company as at December 1792.

The minute agreeing to dissolve the company, is signed by Mr. Geddes as well as the rest of the partners. The advertisement published in the Gazette and other newspapers, with the subscription of the partners, intimating the dissolution of the company, had the appellant's name subscribed to it as a partner, and the minute of sale by the Glasgow to the Dumbarton Company was signed by Messrs. Wallace, Warrock and Geddes.

14 Feb. 1793.
 Minute after
 the dissolution
 of the com-
 pany.

Immediately after the dissolution of the company the books were balanced on their prior transactions, when it appeared that there were nearly 19,000*l.* of debts owing to, and upwards of 11,000*l.* owing by, the company. Supposing the debts good, the loss upon the balance for that year would have been 2,766*l.* 7*s.* 3*d.* which the partners by their docquet ordered
 “ to be applied to the debit of the different partners
 “ stock accounts, according to their respective inte-

“ rests at the first of January last: But (they observe)
 “ as debts to a considerable amount are still outstand-
 “ ing, and as the sum set aside as a sinking fund to
 “ answer for bad debts* and discounts may not be
 “ sufficient, we cannot at present ascertain the exact
 “ loss upon this concern, and therefore we hereby
 “ agree, as mentioned in last docket, that in case
 “ of the death of any of the partners before the end
 “ of the contract or winding up of this concern, that
 “ our heirs, executors, or assignees shall be liable to
 “ sustain what ever loss may be applicable to the
 “ share of such deceased partner at that time.”

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10 July, 1798.

His answer.

This minute was not signed by the appellant. Some time elapsed after the dissolution of the partnership, while the partners were employed in winding up their affairs. After the debts due to and from the company had been settled, it ultimately turned out that there was such a defalcation of funds, from the failures of persons indebted to the company, and other causes, that the partners, when interest was calculated on their respective balances, were subject to a loss.

In 1798, Mr. Archibald Wallace, one of the respondents, transmitted to the appellant a statement of accounts between him and the company, in which the appellant's share of loss is placed to his debit.

The appellant on the 10th July 1798, returned an answer, in which he said, that the company were considerably in debt to him; and in a subsequent part of his letter he adds, “ I have nothing to do with
 “ the losses of the late Glasgow glasswork company.
 “ If they think otherwise, they must take what mea-
 “ sures they can for making their claim effectual.”

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During the period of his connexion with the Glasgow glasswork company, the appellant had occasionally drawn from the company's funds small sums for his subsistence. After he had quitted the service of the company, some further payments were made to him in liquidation of his allowances; but no conclusive settlement was made. The company insisted, that he had overdrawn the sum to which he was entitled; and that upon making up the books, it appeared that he was debtor to the company to the amount of 650*l.* 11*s.* 2*d.* being for payments made to him, after he quitted their service.

The claim which the company thus made against the appellant, to refund the money so paid to him, rested upon an assertion, that the appellant was entitled to no higher salary than 100*l.* per annum. The appellant offered to consent to an adjustment of the amount of his salary by reference to arbitrators, which was accepted by the respondents, and two persons with an umpire were named.

The bond of arbitration submits all pleas, claims, and debates, "and debateable matter whatever, presently subsisting between the said Glasgow glasswork company and the said John Geddes, for whatever cause or occasion, previous to the date hereof; and particularly, without prejudice to the said generality, a claim made by the said John Geddes upon the said parties or partners of the said Glasgow glasswork company, for a certain sum of money to be allowed him for his management of the company's affairs, and extra trouble while he superintended their works, to the decree arbitral of," &c.

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In the pleadings under the submission, the claims of the parties were confined to two points; first, a claim for adequate salary on the part of the appellant; and secondly, a counter claim for advances made in cash and goods by the company to the appellant, after he quitted their service. These advances, after extinguishing a salary of 100*l.* per annum, left a surplus of 602*l.* 9*s.* 8*d.* In a letter to their law-agent at Edinburgh, the company say, “the difference between the company and Mr. Geddes is chiefly, if not solely, a claim of salary for additional trouble.”

15 June, 1795.

The submission having expired without a decree, the parties had recourse to a court of law. The company raised against the appellant an action in the Court of Session in Scotland, in the name of Mr. Hamilton, one of the partners, as attorney for the rest, concluding for payment of 650*l.* 11*s.* 2*d.* with interest from 31st December 1792, the date at which the books were balanced. The above sum was the alleged surplus received by the appellant over and above the salary for six years and a half. The appellant raised a counter action against the company, concluding for payment of 911*l.* 3*s.* This action was founded on the claim of the appellant to be entitled to salary at the rate of 275*l.* per annum.

After the cause had been brought into court, the appellant, in a letter to one of the partners, proposed a new reference, which was at last agreed to, and the arbitrators named and appointed.

In this second submission, the claims of parties stood as before. Archibald Wallace, acting for the

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July 23, 1798.

company, addressed to the arbiters two letters; in one of which he says, "The sum of 650 *l.* 18 *s.* 2 $\frac{1}{2}$ *d.* " is the amount which the Glasgow glasswork company claim as due to them by Mr. Geddes, agreeable to account rendered;" in the other letter dated the 15th October 1796, he thus expresses the sentiments of the respondents, as to their rights: "We would wish to remind the arbiters, that the " Glasgow glasswork company's claim against Mr. Geddes, began with the sum of 175 *l.* 10 *s.* 7 $\frac{1}{2}$ *d.* " balance due by him on 1st Jan. 1792, agreeable " to a state of the company's affairs at that time, " signed by him and the partners." No claim for loss of capital was brought before the arbitrators, but in this, as in the former reference, the sole question was the rate of salary payable to the appellant. This submission also having expired without a decree, the cause was resumed in court. In the course of the pleadings, the company produced the copy before stated, of a contract between the company and the appellant, written on stamped paper, but not signed by any party. They alleged, that this was the contract which was meant to have been executed, to regulate the rights of the appellant, and that it was alluded to in the 15th article of the principal contract, already recited. According to this unsigned contract, the appellant was to have a salary of 100 *l.* per annum. The appellant denied all knowledge of the contract, and contended that he was not privy to it, and that it was not binding upon him.

The company in their pleadings further insisted, that in their books they had given credit to the appellant at the rate of 100 *l.* per annum, and that the

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books must be considered as under his care, because he was the manager of the company. The appellant alleged that he kept none of the books; that they were kept by Stewart Telfer; that the hand writing of the appellant, except as a subscriber to some docquets, would not be found in the books; and offered to prove, that the books were kept by a clerk not under the superintendence of the appellant, but under the committee of management; that the appellant had never consented to the entries in question, which had been inserted by the direction of the managing committee, with a view to the final balancing of the books. Finally, the company contended, that the sum of 100*l.* per annum was, in itself, a reasonable allowance as a salary to the manager of such glassworks, considering that the appellant was to obtain a *share of the profits* of the business in addition to his fixed salary. On that question of fact concerning the reasonableness of the rate of salary, the appellant joined issue with the company, and called for a remit to persons of skill and experience in the business.

By an interlocutor, dated November 13th 1798, Lord Craig, (Ordinary) found the appellant entitled to salary, at the rate of 120 *l.*

Both parties lodged representations to the Lord Ordinary against that judgment.

Interlocutor of
Lord Ordinary,
13 Nov. 1798.

The Lord Ordinary having adhered to his judgment, both parties presented petitions to the whole court, and the case was remitted to persons acquainted with this branch of business, to report their opinion upon the merits of the appellant's claim for salary. The following judgment was afterwards pronounced:

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Interlocutor,

11 June, 1800.

“ The lords having resumed consideration of the said
 “ petition for Gilbert Hamilton and others, with
 “ the counter petition of John Geddes of the
 “ 1st March last, with the remit therein of the
 “ 4th of that month, and reports made in conse-
 “ quence thereof by Messrs. William Tennant,
 “ John Niven, and James Smith, now lodged in
 “ process—Finds the said John Geddes entitled to
 “ an allowance, including all his claims for salary,
 “ extraordinary trouble, or for the expenses of en-
 “ tertainments in his house, at the rate of 226 *l.*
 “ 18*s.* 5½*d.* sterling per annum, during six years
 “ and a half that he acted as manager for the peti-
 “ tioners Gilbert Hamilton and others ; and remit
 “ to the Lord Ordinary to proceed accordingly, to
 “ hear parties *on any claims of compensation*, and
 “ all other points of the cause, and to do therein as
 “ he shall see just.”

The appellant acquiesced in this judgment ; but the company presented a reclaiming petition, which was refused ; whereupon the company appealed to Parliament.

In the printed cases of the company presented to the House of Lords, as appellants, in that case, the second reason of appeal is in these words : “ The
 “ manager, as a partner, has a share of the profits ;
 “ and, when the two glasswork companies were
 “ united in 1786, there was conferred on him a
 “ greater proportion of those profits than upon the
 “ other partners.” It was added, they, “ made
 “ Mr. Geddes’s emoluments to a certain extent to
 “ depend upon their trade being profitable or not ;
 “ for they made him a partner entitled to a share of

“ the profits, and they increased his share in 1786,
 “ *instead of conferring on him a large salary.*”

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The fifth reason of appeal declares, that Mr. Geddes (then manager) had a share of profits as a partner without capital, “ which he accordingly “ received as the salary due to him.”

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The judgment of the Court of Session was affirmed in the House of Lords, and the cause returned to Lord Craig, Ordinary, to adjust the accounting between the parties. The appellant put into process a state, showing, that in terms of the final interlocutors of the Court of Session, affirmed in the House of Lords, he was creditor of the company to the amount of 401*l.* 3*s.* of principal, and he claimed interest on the arrears of his salary.

26 March
 1805.

A new litigation now commenced in the form of objections, answers, replies, and duplies. Disputes were raised about the mode of charging interest, &c. and the company now brought forward a claim which had formed no part of their former pleadings, that Mr. Geddes must be liable for a share of losses sustained by the company many years before, to an extent sufficient to extinguish his claim of salary, and to turn the balance against him.

On the 13th of May 1806, Lord Craig, Ordinary, pronounced the following interlocutor: “ Having
 “ considered the foregoing objections for Gilbert
 “ Hamilton, and the other partners of the late
 “ Glasgow glasswork company, defenders, with the
 “ answers thereto for John Geddes, pursuer, replies,
 “ and duplies,—Finds, that an interest account
 “ must be stated between the parties, giving each
 “ of them interest on the sums they shall appear to

Interlocutor of
 Lord Ordinary,
 13 May, 1806.

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“ be in advance ; and, with regard to the plea of
 “ compensation for alleged loss, finds it too late
 “ to insist on this claim in the present process ; and,
 “ before answer as to the other points of the cause,
 “ remits to Mr. Claud Russell, accountant, to exa-
 “ mine the books of the company, and vouchers,
 “ and to report, his opinion thereon *quam*
 “ *primum.*”

Interlocutor,
 June, 1815.

The action about the salary, after much further litigation, terminated in favour of the appellant, by a judgment, in June 1815 for his salary, with expenses.

Nov. 1808.
 New action
 for loss.

In the meantime, in consequence of Lord Craig's interlocutor, refusing to allow the new claim for loss to be intermingled with the original action about salary, the company, in November 1808, brought a new action, concluding against the appellant for payment of a share of alleged losses said to have been sustained by the company. The sum of 512*l.* 9*s.* was claimed as the appellant's share of loss to January 1798, with interest from that date, and a further claim was made for posterior losses.

The appellant, on his part, raised a counter action, concluding for an accounting and payment of the share of profits due to him by the company, upon the supposition that he was entitled to receive a share of profits during those years in which no loss occurred.

The action, at the instance of the company, was brought in the name of Mr. Hamilton, one of the partners of the company ; upon whose death, Mr. Wallace, another partner, became the pursuer. This second action also depended before Lord Craig, by whom a remit was made to an accountant, to inquire

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into the state of accounts as they stood in the books of the Glasgow glasswork company, from 31st December 1797, five years after the appellant quitted the company, to 15th May 1813.* The books had been kept by the respondent, Mr. Wallace, since August 1792. It was reported by the accountant, that the charge made in these books against the appellant, amounts to 1,021 *l.* 16 *s.* 6 *d.*

The actions about profits and losses, which had been conjoined, being remitted, upon the death of Lord Craig, to Lord Gillies, as Ordinary, he pronounced the following interlocutor: “ Having heard
 “ parties procurators—Finds, that Mr. Geddes is
 “ liable in his share of the loss as a partner of the
 “ Glasshouse company; but that no part of the
 “ expenses incurred in the process, at his instance,
 “ for salary, falls to be stated as a part of the loss,
 “ but that the same must fall entirely upon the
 “ other partners.”

Feb. 19, 1814.
 First interlocutor appealed from.

Against this interlocutor, the appellant presented a short representation, upon which the following interlocutor was pronounced: “ The Lord Ordinary
 “ having considered this representation, which does
 “ not state the merits of the case—Refuses the
 “ desire thereof, and adheres to the interlocutor
 “ complained of.”

Mar. 11, 1814.
 Second interlocutor appealed from.

Afterwards, this interlocutor was pronounced: “ The Lord Ordinary having again considered the
 “ representation, with the answers thereto—Refuses
 “ the desire of the representation, and adheres to
 “ the interlocutor complained of.”

Dec. 20, 1814.
 Third interlocutor appealed from.

The appellant submitted these interlocutors to review of the court (first division), by petition; on

Mar. 2, 1815.
 Fourth interlocutor appealed from.

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advising which, with answers, the following interlocutor was pronounced by a majority of one judge :

“ The lords having resumed consideration of this petition, and advised the same, with the answers thereto—They refuse the prayer of the said petition, and adhere,” &c.

Feb. 9, 1816.

Fifth interlocutor appealed from.

A new petition, and additional petition, were presented by the appellant ; on advising which, the following judgment was pronounced : “ The lords having resumed consideration of this petition and additional petition, and advised the same, with the answers thereto, and excerpts from the books of the Glasgow glasswork company, for both parties—Refuse the desire of the said petition, and adhere to their former interlocutors.”

Against these several interlocutors, the appeal was presented.

For the appellant.

For the respondents.

In the course of the argument the *Lord Chancellor* observed, that, when the stock account was first opened, the appellant was debited and credited for the same amount, or supposed value of stock, viz. 625*l.* ; and asked, whether he was charged in subsequent accounts on the same principle ? and whether it was a substantial credit, or only for the purposes of calculation ? At first (he remarked) it clearly was so merely ; and he put the further question, When afterwards the partnership credited the appellant with five eighty-fifths of the stock, whether they debited him, per contra, in the same fraction ?

The *Lord Chancellor* also asked, Whether it was contended that the appellant was to have no salary,

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if the loss in any one year amounted to a sum which would exceed his salary? or what he would receive if there was no profit? It was answered, that in both cases he would receive his salary; upon which answer the *Lord Chancellor* remarked, that in such view the other partners would be losers. He then added the following observations :

The Court of Session, in the former case, computed the salary on the supposition that the appellant was to have a share of profit as a partner, which appears from the *dicta* of Lords Balmuto and Balgrath. The declaratory clause provided, that on the decease or bankruptcy of any of the partners, their shares should devolve to the partnership to which they originally belonged, and of which the deceased or bankrupt parties were partners, paying an equivalent to their representatives. Now Geddes was no partner in either of those partnerships. Suppose he had died within six months, what could his representatives have claimed? In the former case my opinion was, that he was entitled to *l.* a-year only as salary, and to no further remuneration, upon the ground that he claimed and was entitled to a share in the profits; nothing having been suggested or contemplated as to losses.

The Lord Chancellor, after stating shortly the judgments against which the appeal was brought, proceeded as follows :—

Motion for
judgment,
24 July.

The question in this cause is, whether the Lord Ordinary and the court were right or not in finding that Geddes was liable, under the circumstances of the case, for his share of the loss as a partner. I observe, that when the judgment of the court was given, it was pro-

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nounced by what we are accustomed to hear termed by the bar, the narrowest possible majority, that is, two of the judges were of opinion that he was not liable for loss as a partner, three of them were of opinion that he was liable; and the question is, under all the circumstances of the case, whether that judgment is or is not right. It appears, that by an instrument, executed in 1786, this partnership was formed. Geddes had formerly been a species of manager in another glasswork concern; but when these two concerns formed one partnership, they executed this bond of co-partnership. It is entered into by Peter Murdock and several other persons, stating themselves to be all partners in the company carried on under the firm of Murdock, Warroch, & Co.; likewise, James Dunlop and several other persons, all partners in the company, carried on under the firm of Dumbarton Glasswork Company; the whole of the above, being now partners in the company carried on under the firm of the Glasgow Bottlework Company, on the first part; and Patrick Colquhoun and several other persons, all partners in the company at present carried on under the firm of Hamilton, Brown, Wallace, & Co. at Verreville, on the second part; and John Geddes, at present manager of the Glasgow bottlework company, of the third part.

In a case, in which the question is, whether Geddes was a partner, and not only a partner with respect to the world, but in what relation he stood as a partner with reference to this co-partnery, it is not immaterial to observe, that though he is unquestionably a partner to some purposes, yet he is treated, in the very descrip-

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tion of the parties to this instrument, as an individual of the third part, separate from those of the first and second parts. Then this instrument proceeds to state, that "whereas the said two companies have judged it "to be for their mutual advantage to form a junction, "and enter into a co-partnership together, for the "purpose of manufacturing glass, in such branches "as they shall afterwards think best for their interest; "they have agreed, and they hereby do agree, to the "following articles, as the fundamental rules and "regulations of the said co-partnership, and which "are hereby declared to be the conditions under "which the said junction is made and this co-partnery formed, and which the whole partners "bind and oblige themselves, their heirs, executors "and successors to conform to and implement to "each other: First, the firm of the company shall "be, the Glasgow Glasswork Company, which shall "not be used but for their behoof, and such manager only as they shall appoint shall have power "to sign the name. Second, the said co-partnership "shall continue and endure for the period of nine "years complete, from the 1st day of June next, when "the junction shall take place: and it is likewise hereby declared, that the capital stock to be employed "therein by the partners shall extend to 12,000 £. sterling, two-thirds of which shall be advanced by the "partners, according to their respective shares after-mentioned, and one-third may be borrowed, on "the joint securities of the company." Now these words appear to me to be material to be attended to: "two-thirds of which shall be advanced by the "parties, according to their respective shares after-

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“ mentioned, and one-third may be borrowed, on the “ joint security of the company.” With respect to what thus appears to be advanced by this agreement among the partners, according to their respective shares after-mentioned, I have mistaken the facts of this case altogether, if I am not at liberty to state, that Geddes unquestionably (though in a sense a partner) could not be considered as one of those partners who was to advance any part of the two-thirds, according to their respective shares after-mentioned. I take it to be a fact, that Geddes was to contribute nothing of the capital; and it becomes material therefore to observe, that the words “ the partners in this bond of co-partnery,” must be construed, in reference to the subject matter of the clause in which it is used. The partners who are to contribute according to their respective shares, must be those partners who were to contribute some share of the capital, and Geddes was not to contribute any share of the capital.

These articles further provide, that “ in the said “ capital stock of 12,000 *l.* sterling, the partners shall “ be interested in the profit or loss in the following “ proportions; namely, the partners, under the firm “ of the Glasgow bottlework company, eight seven- “ teenths; and the partners, under the firm of Ha- “ milton, Brown, Wallace, & Co. eight seventeenth “ shares; and the said John Geddes one seventeenth “ share.” Under this clause, which is the third article in the bond of co-partnery, it is insisted, that Geddes was to be liable to loss as well as profit; and this is the clause upon which, in addition to docquets and entries in the books of the company, &c. the Court

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of Session held, that he was not merely entitled to profit but liable to loss. Now, that these words do, in the most express terms, render him liable to loss, there can be no doubt, but you are to take the whole of this instrument together, and you are not only to look at the whole of this instrument together, but you are to look at the transactions of the parties; for, whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners. It becomes necessary therefore in this case, to examine accurately, not only the whole instrument, but what have been the dealings among these parties. With this view, it is material to consider the eighth article, by which it is provided, "that on the 1st of June next, each
"of the parties shall advance and pay in to the
"company's manager, their respective proportions of
"stock as before mentioned; in payment of which
"stock shall be reckoned the foresaid ground, houses,
"utensils, goods, materials, &c. as before specified,
"(the stock of goods at Verreville being always ex-
"cepted); and in case the amount of the property,
"belonging to either of the said two companies shall
"exceed their respective proportions of stock, the
"overplus shall be repaid to them by the united com-
"pany, by granting them bills for the same, payable
"in six or nine months, with interest thereon from
"the 1st day of June next, the date of the junction."

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Here is another clause purporting to relate to all the partners, which can have no relation, as it seems to me, to Geddes, because he was not to contribute any part of this capital.

The fifteenth clause is expressed in these words, "although, by this contract, John Geddes is admitted a partner, and holds one seventeenth share in this company; yet, it is expressly declared and understood, to be under the conditions and restrictions more particularly specified in an agreement of this date, made and entered into between him and the company, and to which all the parties hereto bind and oblige themselves to conform." It is quite clear, from this fifteenth article, that Geddes was to be, in some sense, a qualified partner; in what sense and with what qualifications is to be collected from an agreement of even date; and, it will be in your recollection, that there was an instrument which Geddes firmly denied to be an agreement of even date, which the other parties asserted to be an agreement of even date, and the substance of which I shall have occasion to state.

This bond of co-partnership being executed, and this unexecuted agreement, either being or not being the agreement, meant to be referred to by the fifteenth article, the parties go on dealing in partnership from 1786 to 1792. It is undoubtedly to be looked at as a circumstance of evidence, that in several instances Geddes's name is put into securities given by the company as a body. He, acting as one of the partners in the partnership, is unquestionably a partner with respect to all the rest of the world; and from the circumstance of his joining in the securities,

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(a circumstance that happens every day where a man is not a partner for loss), it must be admitted, that he was clearly and undoubtedly a partner as to the world for loss; but the question here is, whether he was a partner as between himself and his partners, for loss as well as for profit. He contends, that he was entitled to so much a year for salary, that he was likewise to have the inducement of sharing a seventeenth of the profits, if there were any profits; but if there were no profits, and the thing was on the whole a losing concern, that he was not to be liable, as between himself and his partners, to pay part of that loss. It struck me very early in the argument, as a very singular thing, if he was to be so liable; because if, as manager he was to have a salary, (put it so, that he was to have 100 l. a year as a salary;) and there was a loss in the course of the year of 1,700 l. and he was to bear his proportion of that loss as between the partners, that proportion being 100 l. he could not get one shilling of his salary.

Similar difficulties run through the whole deed.

Without entering into particulars, I observe, that there was an end of this partnership about the year 1792, and it is reasonable to suppose, that, in the year 1792, when the partners were about to dissolve all connection with each other, they should have contemplated the obligations they were under to each other, and the demands they would have on each other.

The law, as I apprehend, is, that the transactions of partners are always to be looked at, in order that you may determine between them, even

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against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration. Taking that to be the law, it appears to me, notwithstanding all the difficulties which belong to certain transactions, which are stated as having taken place while the partnership existed between 1786 and 1792, that the transactions after 1792 are such in their nature, that, consistently with the safety and the interests of mankind, it is impossible to permit these copartners after those transactions, in my judgment, to say that Geddes was a partner with them for loss. Observe what those transactions are : Geddes brings them into court in 1792, demanding from them his salary; what do they do upon this ? they refer the matter to arbitration—that arbitration goes off; they refer it to arbitration again—that arbitration goes off. He then brings an action in the Court of Session, in order to have his salary calculated, estimated and paid; the parties proceed in the Court of Session, until a judgment is obtained in that Court, that the appellant is entitled to such a sum of money. There is then an appeal to this House. In the petitions of appeal he is represented as a partner without capital,—those are the very words which are used in some of the petitions; and your Lordships affirmed that judgment of the Court of Session.

The first demand in any tenable form, that he should be liable to loss, was made in a suit instituted in the Court of Session, in Scotland, in the year 1807, that is fifteen years after this partnership was dissolved, and in the mean time, he was suing them

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for the amount of his salary, a claim upon which they would have been entitled to have said : If you establish your right to this salary, you are, on the other hand, liable to us for so much loss ; therefore, calculate it as you will, you **cannot** be entitled to demand any thing, or, at all events, **not so much**.

The first intimation of a claim upon him was in the year 1798, six years after the partnership was dissolved, when one of the partners wrote a letter to him, insisting that he was liable to losses in partnership. He wrote in answer : I was not a partner in capital, I am not liable. With that exception, they did not make a demand upon him, in a form in which he could resist it, until the year 1807, fifteen years after the partnership was dissolved ; it appearing that, in the mean time, there were statements made out of the different proportions of the various shares, (amounting, I think, in the whole to eighty,) in which persons were supposed to have an interest in the stock, and his name never occurred in any one of them.

Now, it is true, that during the existence of the partnership there are to be found docquets, there are to be found statements, and there are to be found writings, from which you would infer that he was a partner, both for profit and for loss. But looking at the whole of these entries, as he had no interest whatever in the capital, it is as impossible that many of those entries can refer to him, though he was a partner, as it is that some of those clauses in this instrument of co-partnery could refer to him. He was a partner capable of being dismissed at any time ; he was a partner having no right to draw out any part of the stock, for he had

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no stock in it ; and therefore the terms which are used lead forcibly, according to my notion, to the conclusion, that though he was a partner, he was, in some qualified sense, a partner different from the sense in which the other partners were interested ; and if he had thought proper to quit the partnership, if he had died, or become a bankrupt, the *provisions*, with respect to death or bankruptcy, could not have applied to him as they would have applied to all the other partners in this co-partnery concern ; but, on the contrary, he stands distinguished from first to last in the nature of his interest.

In the course of dealings among men, there are a great many things done, some with more, some with less, regularity ; some with more, some with less, irregularity ; and men, before they quarrel, are much too apt to suppose they shall be set right easily when they happen to quarrel ; but I wish to ask this question : How happened it, that if this partnership was dissolved in 1792, no special demand should be made upon the appellant, I say special demand, till 1807? fifteen years afterwards. The reasons they attempt to give in this case appear to me the most futile and ridiculous possible : They say, so long as the amount of his salary could not be ascertained, they had no reason to talk about losses ; then, I ask, why did they, in the letter of 1798, talk about losses ; and what signifies it, whether it was ascertained, if they had a single demand, which would extinguish, or *pro tanto* extinguish, that salary. It appears to me utterly impossible that that could be the reason on which they acted ; but besides, they impute to him the receiving, as he actually did receive, some sums of money after he left the part-

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nership--they paid him sums of money after he left the partnership; and you will recollect in the former cause we had notices of that fact. If he was liable to losses for the partnership, and they contemplated them as due from him, is it possible they could have paid this, and not have demanded the losses?

The case has difficulties and peculiarities upon the bond of co-partnery itself. It has many difficulties and peculiarities with respect to an agreement, which is referred to by the fifteenth article of the bond of co-partnery; one of the parties having contended that a certain paper, unexecuted and unsigned, is that agreement; which is denied by the other party, the appellant. It is undeniable on the face of this bond of co-partnery itself, that he was to be, in some qualified sense, a co-partner; but then it is said, as this deed was never executed, he must be taken to be a partner in the sense in which other persons were; I say, that is impossible from some other parts of that deed of co-partnery; and with respect to the docquets and entries to which I have been referring, they admit of this explanation: that they must be taken to apply to those partners, and those partners only, who had part of the stock belonging to them, and who were to be dealt with, in case of bankruptcy or death, according to principles which do not apply to this person.

I say further, that if you had found unequivocal proof in the transactions, during the partnership, that he was to be considered a partner, liable to his share of profit and loss; supposing the articles,

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clearly and unequivocally to express that he was to be liable to loss, he would, upon the construction of the articles, and by inference from his conduct, have been liable to loss; but even if the case did amount to that unequivocal proof, (which it does not,) the subsequent transactions might have so weakened and destroyed that proof, that you could not act fifteen years afterwards upon the effect of any such transactions as those. For the conduct of these persons, from 1792 down to 1807, is a conduct from which you would be authorized to infer that they never did, prior to 1792, or in 1792, draw those inferences from those transactions which they wish you in 1820 to draw from those transactions.

It is, therefore, on the ground of the subsequent transactions that I entertain the opinion very confidently, (I must say, at the same time, very humbly differing from the majority of the Court,) that no jury in this country could have been brought to find this man a partner on this suit, instituted in 1807; and therefore I move the House,—To find that Mr. Geddes ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and, with that finding, to remit the cause to the Court of Session, to do in it what is right and consistent with that finding.

24 July 1820.

The Lords find the Appellant ought not to be considered, as between him and his partners, as a partner liable to any share of loss; and with this finding, it is ordered that the cause be remitted to the Court of Session, to do as is just and consistent with this finding.

SCOTLAND.

ON APPEAL FROM THE COURT OF SESSION.

RICHARD HOICHKIS and JAMES TYLER, Clerks to the Signet, designing themselves Trustees, nominated and appointed by the deceased Colonel WILLIAM DICK- SON of Kilbucko, - - -	}	<i>Appellants,</i>
JOHN DICKSON, Esq. Advocate, now of Kilbucko, - - -	}	<i>Respondent.</i>

A pursuer, asserting in an action of declaratur a right as unlimited fiar of lands, has power to execute, and is bound by a deed of entail restricting his estate to a life-rent.

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A transaction between parties dealing upon a doubtful question as to their rights, if it be not tainted with fraud, will be upheld, although one of the parties, being an advocate and brother of the other party, acted generally in the transaction as the legal adviser of the other party.

I. being seised of lands in Scotland, executes a deed, vesting the lands in trustees for sale to pay debts, and afterwards to manage the residue of the lands until, by accumulation of rents, they could purchase an equivalent in lands in the place of those which should be sold, and he directed that an annuity of 100 *l* for life should be paid to *D.* his brother and heir at law, and a like annuity to *W.* the son of *D.*, and when the purposes of the trust should be accomplished, the trustees were to divest themselves of the estate in favour of such person as at that time might be the eldest son of *D.* and his heir; *I.* had never completed his title to the lands, and *D.* not being satisfied with the provisions of the trust, served himself heir to his father, passing by his brother *I.* and brought an action to reduce the deed of trust.

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A judicial sequestration of the estate was the consequence of this action, and other matters in litigation respecting the estate.

In order to settle all disputes, the parties interested, including *D.* and *W.* executed a deed, submitting all differences to the award of chosen arbitrators. The deed, among other things, empowered the arbitrators to determine "in what manner, to what series of heirs, and under what conditions, &c. the lands should be settled.

The arbitrators, by their award, directed that *D.* and *W.* should execute, as to the lands not sold, a tailzie and strict settlement in favour of *D.* in life-rent, and *W.* and the heirs male of his body in fee, whom failing, &c. with the clauses prohibitory, &c. contained in a scroll, &c. and particularly that the life-rent of *D.* should be charged with the payment of an annuity of 250*l.* to *W.* which should be a real burden on the lands.

D. and *W.* executed a deed of entail accordingly; but *D.* refusing to deliver it, another deed of similar import was drawn up and executed by *W.* only, to whom the trustees executed a deed of renunciation and disposed the lands; *D.* having previously, by order of the arbiters, conveyed to the trustees upon his claim of right as heir, and to perfect their title.

The entail contained the usual prohibition against selling the estate.

Upon failure of issue of *W.* the lands by this new entail were limited to *J. D.* next brother of *W.* The entail was executed in 1776.

In 1785, *D.* being dead, and *W.* being in possession of the lands, and claiming a right, notwithstanding the entail, to sell for payment of debts, conveyed the lands to a trustee for that purpose; and the trustee having accordingly contracted with a purchaser, an action of declaratur was raised by *W.* and the purchaser against *J. D.* and the other heirs of entail, concluding to have it declared that the lands were liable to the trust for the payment of debts, and the decree of the Court was according to the conclusion of the summons.

In the year 1808, *W.* being embarrassed and in debt, advertised all the lands, except one farm and a few parks, with the mansion, for sale. Whereupon *J. D.* remonstrated, and having threatened to prosecute, on behalf of himself and the other heirs of entail, a

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declaratur of irritancy, a compromise was effected on the terms that a sufficient part of the lands should be sold to discharge the debts of *W.*, and that of the lands remaining unsold, a new entail should be made, restricting the estate of *W.* to a life-rent, and giving to *J. D.* and the heirs of the former entail, estates in tail general. *

In this transaction *W.* had no legal adviser but his brother *J. D.*, who was an advocate, and had usually acted in that capacity towards *W.*

The deed of entail was drawn up under the direction of, and settled by *J. D.* It contained a recital of the former entail; a statement of former sales of parts of the lands by *W.* that he had thereby become liable to a declaratur of contravention of irritancy at the suit of *J. D.*, but that he had agreed, for the accommodation of *W.*, not to object to the sales already made, nor prosecute his right of action, on condition that *W.* would execute the deed; and upon this recital, *W.* thereby limited the lands unsold to himself in life-rent, and to *J. D.* *in fee*, and the heirs male of his body, whom failing, to the heirs female of his body, &c.

This deed was accordingly executed by *W.*, but he becoming again embarrassed and involved in debt, at the instance of his creditors, brought an action to reduce this deed of entail, on the ground of fraud, want of power, &c. The Court below held that *W.* had power to execute the deed, that it was delivered and irrevocable, that there was no legal ground to set it aside; and that it did not appear, from the tenor of the deed or collateral evidence, that *W.* was improperly or fraudulently induced to execute it.— This judgment was affirmed on appeal.

THE object of this suit was to reduce a deed of entail, and annul a transaction which took place under the following circumstances :

In the year 1767, John Dickson, being seised of the lands of Kilbucho, executed a trust-deed in favour of the Earl of Hyndford and others, wherein,

Trust-deed
made in 1767,
by John Dick-
son.

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after mentioning the destination of the estate, he added a clause referring to a future deed which he meant to execute, "containing such other destination, and under such burdens, conditions, provisions, restrictions and limitations, as I may hereafter appoint to be therein inserted, by any writing under my hand." This purpose was not executed; for Mr. Dickson died suddenly, in the beginning of December, in the same year.

By the deed of trust, the trustees were *directed to sell such part of the estate as might be necessary to pay the debts affecting it*, and thereafter they were to continue their management, *till, by accumulating the rents of the remaining part of the estate, they could purchase lands yielding a rent equal to the rent of the lands which might be sold*. In the mean time David Dickson, the brother and heir-at-law of John Dickson, was to be allowed an annuity of 100*l.*; and a similar allowance of 100*l.* was to be given to William, who was the original pursuer of this action, and then the eldest son and heir of David; and when all the purposes of the trust were accomplished, the trustees were to denude (devest) themselves of the estate, in favour of whatever person might be the eldest son and heir of David Dickson at the time. John Dickson, the maker of this trust-deed, bequeathed various legacies and annuities, and died considerably in debt, which rendered it probable that the trust would be of some continuance.

These circumstances induced David Dickson to serve himself heir to his father William, and thereupon raised an action of reduction for setting aside the trust-deed of his brother John, who had never

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completed his titles to the estate. In consequence of this action, and other subjects of litigation respecting the estate, which occasioned a judicial sequestration, a plan was devised for submitting to arbitration all the matters in dispute between the parties interested in the estate.

The deed of submission empowered the arbiters “to direct what steps should be taken by the parties for denuding (divesting) the trustees, named by the said deceased John Dickson, of the lands, estate, and other subjects which belonged to him, and for removing the sequestration thereof.” It also empowered them “to appoint such parts of said estate or other subjects to be sold, as they shall think necessary, for payment of the debts affecting the same,” &c.; also “to determine what provisions shall be settled on the younger children of the said Mr. David Dickson, and in what manner the same shall be secured;” and further, “to determine in what manner, to what series of heirs, and under what burdens, limitations, conditions, prohibitory, irritant and resolutive clauses, the said lands and estate, or what part thereof may remain unsold, shall be settled;” and in general to determine and appoint every thing to be done, of or concerning the lands, estate, and other subjects, heritable or moveable, that belonged to the said deceased John Dickson, which the said arbiters, or either of them, in case of the death or non-acceptance of the other, or which the said oversman may judge fit and necessary to be done for the interest of the said parties, and a final and amicable settlement of their whole family affairs.”

Deed of submission,
July 14, 1771.

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Preliminary
conditions of
the trustees
denuding.

Mr. David Dickson, as the heir-at-law, and his eldest son William Dickson, as the first expectant heir under the trust-deed, were, in point of form, the only persons named as parties to this submission, and who executed it; but the trustees required the approbation and discharge of every creditor and legatee upon the estate, which was to be obtained in consideration of David Dickson and his eldest son, jointly, giving new heritable securities; and at the same time conveying to a trustee the separate estate of Culter, &c. for the purpose of paying off the debts. In the second place, the direct sanction of at least the immediate substitute heirs under the trust-deed was required; and, in the third place, that the residue of the estate should be freed from debt, and completely secured by a strict entail.

Dr. Michael Dickson, who was a younger brother of David Dickson, and a creditor to a considerable amount, having refused to accede to the arrangement, in order to remove this obstacle, the respondent, with his younger brother David, and another person at the respondent's request, concurred in granting a bond to the trustees for a sum of 3,000*l*.

Award pro-
nounced by
the arbiters.

The preliminaries having been arranged, a decree-arbitral was pronounced, and the trustees executed a conveyance in terms of the trust. These deeds are both dated 11th August 1775, and refer to each other. The decree-arbitral, instead of the annuity of 100*l*. allowed by the trust-deed, awarded to Mr. David Dickson the life-rent of the whole estate, subject to the charge of an annuity in favour of his son; and instead of the annuity of 100*l*. to his eldest son, the sum of 250*l*. charged upon the father's life-estate, was given to him during his father's life, and

upon his father's decease, an estate to him and the heirs male of his body. It contained the following finding as to the execution of a deed of entail :

“ We having now considered the particular situation and circumstances of the estate of Kilbucko, and of the said Mr. David and William Dickson, and the several particulars relative thereto, which have been laid before us, and being desirous, so far as possible, to preserve for the family such parts of the estate as the situation of affairs will permit, &c. decern and ordain the said Mr. David and William Dickson, for their respective rights and interests, on or before the 1st day of October next, to execute a tailzie and strict settlement of the lands and barony of Kilbucko, in favour of the said Mr. David Dickson in life-rent, and the said William Dickson and the heirs male of his body in fee, whom failing, to the other heirs mentioned in a scroll of the said tailzie signed by us of the date hereof, as relative to this decree-arbitral, and with and under the whole conditions, provisions, clauses, prohibitory, irritant and resolute, contained in the said scroll; and particularly with and under this condition, that the life-rent right of the said Mr. David Dickson shall be burdened with the payment of a free annuity to the said William Dickson of 250l. sterling money yearly, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at the term of Martinmas next, for the half year preceding, and so to continue during the life of the said Mr. David Dickson; and which annuity shall be a real burden upon the lands and estate contained in

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Aug. 11, 1775.

Strict entail
ordered.

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“ the said entail ; and the said William Dickson,
 “ in case the same is not regularly paid to him,
 “ shall have access to the rents of the said estate
 “ to the extent of what is unpaid, notwithstanding
 “ the life-rent disposed to the said Mr. David Dick-
 “ son : but it shall be declared by the said entail,
 “ that although the said William Dickson shall have
 “ access to the rents of the estate for payment of
 “ the above annuity, yet that the by-gones of such
 “ annuity shall not be the ground of any adjudication
 “ of the property of the said entailed estate ; and
 “ we decern and ordain the said parties to put the
 “ said entail upon record in the register of tailzies,
 “ and to complete the same by charter and infest-
 “ ment, as soon as the same can be properly done.”

Deed of
 renunciation
 and convey-
 ance by the
 trustees.

Aug. 19, 1775.

The trustees executed their deed of renunciation and conveyance on the same date as the decree-arbitral, but it was not delivered till the entail was executed.

This deed of entail was executed by David Dickson and his son William ; but David having previously executed an entail, which is still extant, refused to deliver up the new one.

In consequence of this refusal, some delay took place ; and as the trustees would not give up their deed of renunciation till the entail was also delivered up, another copy of the deed of entail was prepared and executed by William alone, who, being formally the disponee of the trustees, was sufficiently *in titulo* to execute the entail alone. The deed was accordingly so executed. It proceeded expressly upon the decree-arbitral, and contained all the usual prohibitory, irritant and resolute clauses, and was executed according to the statute 1685, ch. 22.

Jan. 7, 1776.

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John Dickson, who executed the trust-deed, not having completed his titles to the estate, the right of his trustees was incomplete, especially as David had served himself heir to his father, passing by his brother John. In order to remove this objection, David, by order of the arbiters, conveyed the lands to the trustees. The trustees then conveyed to William, and he, by order of the arbiters, executed the entail.

The entail contained the following provision: Prohibition against selling.

"It shall not be in the power of me, the said William Dickson, or any of the heirs of entail succeeding in the said lands and estate, to sell, alienate, or impignorate the same, or any part thereof, either irredeemably or under reversion, or to burden the same in whole or in part, with any debts, or any other burden, incumbrance, or servitude whatsoever."

The irritant clause, which is coupled with a provision, binding William Dickson and the heirs of entail to redeem adjudications or other legal diligence, is thus expressed: Irritant and resolute clauses.

"In case of our failing to redeem accordingly, we shall forfeit and lose our right to the lands and estate above disposed, &c.; and with and under this irritancy, as it is hereby conditioned and provided, that in case I, the said William Dickson, or any of the heirs succeeding to the lands and estate before disposed, shall contravene the before written conditions, provisions, restrictions and limitations therein contained, or any of them, that is, shall fail or neglect to obey or perform the said other conditions and provisions, and each of them, or shall act contrary to the said other limitations or restrictions, or any

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DICKSON.

“ of them, then and in either of these cases, I the
 “ said William Dickson, or any other person or
 “ persons so contravening, shall, for ourselves only,
 “ amit, lose and forfeit all right, title and interest
 “ which we have to the lands and estate before dis-
 “ poned, and as such right shall become void and
 “ extinct, so the said lands shall devolve, accresce
 “ and belong to the next heir appointed to succeed,
 “ although descended of the contravener’s own body,
 “ if capable to possess and enjoy the said lands and
 “ estate, in the same manner as if the contravener
 “ were naturally dead, and had died before contra-
 “ vention.”

The concluding clause of the entail was in these words: “ And lastly, I hereby authorize the said
 “ Mr. John Dickson, or any of the substitutes above
 “ named, to apply to the Court of Session to have
 “ this present tailzie judicially recorded, in terms
 Feb. 13, 1776. “ of the act of parliament.” The deed was accord-
 ingly, on the 13th of February 1776, recorded upon
 a petition by the respondent, Mr. John Dickson, the
 first substitute, and thereby completed, agreeably
 to all the forms which are required by the law of
 Scotland.

For several years after the trustees departed, the respondent managed the estate as factor both for his father, Mr. David Dickson, and for his brother William, who was the pursuer of the present action in the Court of Session. In March 1779, the pursuer went in the army to America, and the respondent then accepted from him a commission and factory under which he managed all his affairs in Great Britain, both before the father’s death, which

took place in 1780, and afterwards until the respondent's return at the peace.

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In consequence of the embarrassment of his brother's affairs, and soon after his return, the respondent resigned the factory and commission. But previous thereto he raised an action before the Court of Session, under a power reserved in the deed of entail, for selling as much of the estate of Kilbucko as was necessary to relieve his brother from some debts which were a burden upon the entail. By the decree of the Court, in this action, it was found, "that the pursuer must lay out any surplus price of the said lands, when sold, at the sight of and to the satisfaction of the heirs of entail, in the precise terms of the said disposition and entail."

Decree of the
Court as to
surplus price.
Dec. 16, 1784.

Upon the sale there was a surplus of 600*l.* which was not applied in terms of the decree, but appropriated to his own use by William Dickson; who being involved in debt, soon afterwards conveyed the estate to John Loch, in trust, with power to sell the whole or part for payment of his creditors.

Under this power, a part of the estate was sold by Mr. Loch to a Mr. Cunningham. Whereupon an action of declarator was brought in the Court of Session by William Dickson, and Mr. Loch, as his trustee, to have it declared that they had power to make such sale; and at the same time, a bill of suspension was presented by Mr. Cunningham, the purchaser, to delay payment of the price until the judgment of the Court, as to the right of selling, was obtained.

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In that action the respondent was called with the other heirs of entail ; but the suit, (as represented by the respondent), was entirely amicable, and the expense on both sides was paid by William Dickson. The information, in name of the heirs of entail, though it did not oppose the sale then contemplated, sought some security against further sales. The concluding paragraph was in these words: " Upon the whole, the defenders hope your lordships will be inclined to sustain the entail in question, even against the pursuer's creditors. But if, on the contrary, this fair, onerous, and necessary deed shall be found ineffectual against creditors, they trust that it will at least be effectual against the pursuer."

The information for William Dickson stated, that the question was not between him and the heirs of entail, but a question with his onerous creditors, viz.: " Whether this deed of entail may be considered a gratuitous or onerous deed in any question betwixt the pursuer and the heirs of tailzie alone, will not affect the present question, which is a case with the onerous creditors of the pursuer, who insist, by their trustee, that the onerous debts and deeds of William Dickson, the maker of the entail, must be effectual against his estate."

The summons concluded, " that it should be declared, that the trust-deed granted by William Dickson to John Loch affects the lands for payment of the debts therein mentioned, and other debts,"

When the cause came into Court, in the year 1786, Lord Braxfield observed, "that the arbiters designed to bind William Dickson, but they did not take the right way. They should have restricted his right to a life-rent; for so long as he holds the fee of the property his debts must affect it." This opinion was adopted by the Court; and upon the acquiescence of the heirs of entail a decree was made, corresponding with the conclusion of the summons.

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This decision was not satisfactory to the purchaser, who refused to pay the price unless a judgment of the House of Lords was obtained. Upon this objection, to avoid expense and delay, it was proposed, and upon conference agreed, that the respondent should concur with William Dickson in granting the disposition; and a conveyance also was granted to the purchaser of the whole of the remainder of the estate, in real warrandice.

In the year 1809, William Dickson, having incurred new debts, in order to relieve himself proposed to sell a further part of the estate; whereupon the respondent intimated to his brother his intention (on behalf of the heirs of entail) to prosecute a declarator of irritancy, which, though it might not prevent the sale then intended, so far as the interest of the creditors were concerned, yet would prevent any future sales, and in so far secure the interests of the heirs of entail.

Further sale
in 1809.

At the same time the respondent made a proposal and offer to his brother, that if he would do what the

Agreement
and transac-
tion between
the parties.

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Court suggested in the year 1786, and which, agreeably to the opinion then given, ought to have been done at the original settlement of the family affairs in 1776, viz. restrict himself to a life-rent, the matter should be amicably settled without further trouble or expense. To this proposal William Dickson assented; and thereupon a transaction of agreement took place between the parties; the respondent, as next heir of entail, assenting to the sale of part of the estate for the sum of 6,300*l.* which was to be applied, so far as required, in payment of the debts of William Dickson, and the surplus was, by the agreement, to be invested upon the trusts of the entail. On the other hand, William Dickson agreed to execute a new entail, reducing his estate in the lands of Kilbucko to a life-rent.

The deed creating this new entail was drawn by John Dickson, writer to the signet, the nephew of the parties to the transaction, and under the direction of the respondent, who made in the scroll, as originally drawn, the marginal additions which appear printed in italics in the following clauses.

1. I bind and oblige me and my heirs and successors whomsoever, without the benefit of discussing them in order, to infest myself in life-rent; *for my life-rent use allenarly*; and the said John Dickson, and the other heirs of tailzie above-named, in fee, with and under the conditions, &c.

2. In the clause which provides against the lands being affected by debt, the words in italics were marginal additions in the hand-writing of the respondent. “Debts or deeds, legal or voluntary, contracted

“or granted *by me as life-renter*, or by the said John Dickson as heir, or to be contracted,” &c.

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3. The last addition was in the irritant and resolute clause, which originally provided only for the case of heirs failing or neglecting to perform the conditions of the deed; the marginal addition was, “or shall act contrary to the said other limitations or restrictions, or any of them.”

The draft was settled by the respondent, and transmitted to William Dickson; but the respondent had been his ordinary legal adviser, and he had no other adviser in this transaction.

This deed, which was shortly afterwards (1809), executed, proceeded upon the following narrative and statement of considerations, and contained limitations to the following effect:

“Know all men, by these presents, that I, Brigadier-general William Dickson of Kilbucko, considering, that by disposition and deed of entail, executed by me, dated the 27th day of January 1776, I gave and disposed, heritably and irredeemably, to David Dickson, my father, in life-rent, and to myself in fee, and the heirs male of my body; whom failzieing, to John Dickson, advocate, my first brother, and the heirs male of his body; whom failzieing, to the other heirs of tailzie and provision therein particularly mentioned, All and whole the lands and barony of Kilbucko, comprehending the lands and others therein and after mentioned, lying in the parish and regality of Kilbucko, and sheriffdom of Peebles, with and under the conditions, provisions, restrictions, limitations, exceptions, clauses prohibitory, irritant

Preamble
of entail,
Apr. 24, 1809.

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Inductive
cause of the
entail.

“ and resolute, therein specified ; that notwithstanding thereof, I had sold a considerable part of the said lands and estate, and have thereby become liable to a declarator of contravention of irritancy, at the instance of the said John Dickson, which he might now raise against me ; but whereas he the said John Dickson has, for my accommodation, agreed not to object to the sales already made of part of the foresaid lands, for payment of certain debts contracted by me, nor to pursue any action of declarator or irritancy against me, upon condition of my granting the deed underwritten, for the purpose of preventing any further sales of what still remains of the estate : Therefore I have given, granted and disposed, as I do hereby, with and under the conditions, provisions, restrictions, limitations, clauses prohibitory, irritant and resolute, declarations and reservations after specified, give, grant and dispoise, to and in favour of myself in life-rent, for my life-rent use allenary, and to the said John Dickson, my first brother, in fee, and the heirs male of his body ; whom failing, to the heirs female of his body, the eldest always succeeding without division ; whom failing, to the Reverend David Dickson, my next brother, and the heirs male of his body ; whom failing, to the heirs female of his body ; whom failing, to James Dickson, now James Ranaldson Dickson, my third brother, and the heirs male or female of his body ; whom failing, to Elizabeth Dickson, my sister, and the heirs of her body ; whom all failing, to the other heirs-substitute in the foresaid deed of entail, the eldest heir female always suc-

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“ceding without division; and excluding heirs
 “portioners throughout the whole course of succes-
 “sion hereby established, heritably and irredeemably,
 “all and whole,” &c.

The deed contained an obligation to infest procuratory of resignation, precept of sasine, and the usual prohibitory, irritant and resolute clauses, against altering the order of succession, or burdening or alienating the estate. Upon this deed infestment was taken by the agent of William Dickson, and recorded in the record of sasines.

In the year 1813, William Dickson again became embarrassed in his affairs; and being pressed by his creditors, and advised that the entail of 1809 was invalid, he raised an action to reduce that entail. At the same time, the appellant William Tytler obtained from William Dickson a minute of sale of the estate, raised an action of suspension against a threatened charge for payment of the purchase-money, on the alleged ground that the vendor could not give the purchaser a proper right to the estate, but in truth to try the validity of the entail; both which actions came before Lord Balgray, as Ordinary, and were conjoined.

On the 6th of July 1813, the following interlocutor was pronounced, “The Lord Ordinary, having considered the memorial for Colonel William Dickson of Kilbucho, charger and pursuer; memorial for James Tytler, writer to the signet, and suspender; defences for John Dickson, against the action of reduction at the instance of the said William Dickson: In respect that the pursuer and charger asserts and maintains, that he was unlimited fiar

Lord Balgray's
first interlocutor
appealed
from.
July 6, 1813.

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“ of the estate of Kilbucko, and had the right of
“ disposing thereof as he thought proper, *1mo*, finds
“ that so far as he is concerned he had power to
“ execute the deed of entail, dated 28th April 1809:
“ *2do*, finds, that the said entail is a delivered deed,
“ and irrevocable; and that the pursuer has con-
“ veyed away the right of fee, and has restricted
“ his right to that of life-rent allenary; *3tio*, finds,
“ that no legal, just, or reasonable ground is assigned
“ by the pursuer or by the suspender for setting aside
“ the said deed: therefore, in the process of reduc-
“ tion, assoilzies the defender; and in the suspension,
“ suspends the letters *simpliciter*, and decerns.”

Represent-
ation by
Appellants.

Upon a representation by the appellants, the Lord Ordinary again minutely considering the whole argument on both sides, pronounced a second interlocutor.

Lord Balgray's
second interlo-
cutor appealed
from.
Nov. 16, 1813.

“ The Lord Ordinary having resumed conside-
“ ration of this representation (the pursuers), with
“ the answers thereto, and having also resumed
“ consideration of the former papers in the cause,
“ with the deed of entail 1809, and scroll thereof:
“ In respect, *1mo*, that it does appear that the exe-
“ cution of the deed of entail 1809, was, under all
“ circumstances, a measure highly proper, prudent,
“ and expedient on the part of the pursuer: *2do*,
“ that it is admitted by the pursuer, that he volun-
“ tarily executed the said entail, and had power to
“ do so; and that there does not appear, from the
“ tenor of the deed itself, or any other collateral
“ circumstance, any foundation for the allegation
“ that the pursuer was improperly or fraudulently
“ induced to execute said deed; and that the pre-

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“ sent proceedings seem to arise rather from a
 “ change of mind on the part of the pursuer, than
 “ the discovery of any facts attending the execution
 “ of the entail 1809: therefore, refuses the desire
 “ of the representation, and adheres to the inter-
 “ locutor reclaimed against.”

Upon a second representation by the appellants, the Lord Ordinary, on January 21, 1814, appointed informations to be ready in a fortnight; but in the mean time the minute of sale was renounced by a discharge, dated February 7, 1814. Whereupon William Dickson became nominally the sole party. By a deed, dated the 31st of January 1814, William Dickson conveyed to the appellants, as trustees, all his estate and interest in the matter in dispute, with power to carry on the action, or raise a new action in their own name, or in the name of William Dickson, or of his creditors.

By an interlocutor of the Inner House, dated June 2, 1814, “ The Lords having advised the
 “ mutual informations for the parties and whole pro-
 “ cess; the suspension at the instance of Mr. Tytler
 “ being withdrawn, assoilzie the defenders from the
 “ whole conclusions of the actions of reduction, and
 “ find and decern in the terms of Lord Balgray’s
 “ interlocutors of the 6th July and 16th November
 “ last, &c.” By a second interlocutor (June 28, 1814,) a reclaiming petition was refused, without answers; and by a third interlocutor costs were given against William Dickson.

Soon after these judgments had been pronounced William Dickson, the pursuer, died in extreme pecuniary distress, having before his death given to

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his creditors the power of prosecuting the suit then in process, by the trust-deed before mentioned, which was recorded in the books of council and session in Scotland, 9th February 1816, conveying his lands to the appellants, for behoof of his creditors.

The deed commences as follows : “ Be it known
 “ to all men by these presents, that I, Colonel Wil-
 “ liam Dickson, of Kilbucho, taking into my consi-
 “ deration, that upon the 24th April 1809, I was
 “ induced to execute a disposition and deed of entail
 “ of my lands and estate after mentioned, in favour
 “ of myself, in life-rent, and John Dickson, esquire,
 “ of Culter, advocate, my brother, in fee ; whom
 “ failing, certain other heirs of tailzie therein men-
 “ tioned, to my enormous lesion, as well as to the
 “ great injury of my just and lawful creditors ; and
 “ that I have brought an action before the Lords of
 “ Council and Session against the said John Dickson,
 “ and the heirs substituted to him in the said deed,
 “ for setting aside the same on various grounds ; and
 “ which action is now in dependence before Lord
 “ Alloway, as Ordinary thereto : And I being desir-
 “ ous to do every thing in my power for the benefit
 “ of my said creditors, and to enable them the better
 “ to set aside the said deed executed by me to their
 “ prejudice, and to obtain justice for themselves in
 “ the said matter, I therefore hereby give, grant and
 “ dispone, to and in favour of Richard Hotchkis
 “ and James Tytler, writers to the signet, and the
 “ survivor of them ; whom failing by death, non-
 “ acceptance, or otherwise, to any other person or
 “ persons who shall be nominated and appointed by
 “ the majority of my creditors in value, assembled at

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“ a general meeting, as trustees, for and to the use
 “ and behoof of all my present, just and lawful credi-
 “ tors, all and whole,” &c. (the lands of Kilbucko).

After the powers usually conferred by such deed,
 it proceeds thus : “ And for rendering the above-
 “ written disposition more effectual, with special
 “ power to my said trustees and trustee acting
 “ for the time, to insist in and follow forth, at the
 “ expense of me and my heirs and successors, the
 “ aforesaid action of reduction, or to raise such new
 “ actions as they shall be advised to prosecute against
 “ the said John Dickson, my brother, and all others
 “ concerned, and that either in my name, or in the
 “ names of themselves, as trustees aforesaid, or in
 “ the names or name of all or any number, or any
 “ one of my said just and lawful creditors, as they
 “ shall think most conducive for obtaining a void-
 “ ance and reduction of the said deed, and to employ
 “ agents and counsel, and to take all other neces-
 “ sary and lawful steps, at the expense of me or my
 “ aforesaid, for conducting to a termination the said
 “ questions at law.”

The appeal was brought by the appellants as assignees in trust for the creditors of William Dickson.

On the part of the appellants the case was supported by the following arguments :

I. The deed is void, and of no legal effect, being vitiated *in substantialibus*. It purports to have been executed on the twenty-fourth of April 1809 ; but the word *fourth* is clearly written upon an erasure. Such a vitiation is laid down by autho-

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rities, and recognised in practice, as fatal to the authenticity of any deed in which it occurs. According to Balfour*, “an instrument, charter, contract, obligation, or other writing, being rased in any substantial part, as in name or surname, subscription of notar or party, is not authentic, neither sould make any faith, albeit the parties offer him to prove by the witnesses instrumentar, or *per comparationem literarum et instrumentorum, ejusdem notarii*, the said rasure to be restorit, and the said places to be filled by the notar himself.”

To the same effect is the authority of Stair, in his Institutes, b. 4. tit. 42. § 19; who in the same passage states, that the date as to time, as well as place, is *de substantialibus*.

Erskine, in his Institutes, b. 3. tit. 2. § 26, speaking of the case of erasure and interlineation of deeds, says, “the presumption is, that they have been made after the grantor and witnesses had signed the deed, since no person is presumed to sign a blotted or vitiated writing.”

In support of the same doctrine were quoted the following cases: *Edmiston v. Sym & Skeen*, July 1, 1796. Fac. Coll. N° 228. Mor. Dict. 1458; *Bryce v. Dickson*, Nov. 16, 1810, Fac. Coll. N° 6; *Merry v. Howie*, Feb. 6, 1800, Fac. Coll. App. N° 13. Mor. Dict. App. voce Writ, N° 3.

II. The deed in question is reducible on the ground of fraud, which appears from the mode in which the execution of the deed was procured, from the relative duty of the person by whom it was procured, and from its effect upon the interest of the parties.

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The deed in question was drawn out by Mr. John Dickson, junior, nephew of both parties, exclusively by the direction of the respondent. Its effect and import never were explained to the appellant by the writer; it was neither explained, nor any part of it read over at the time of signing it; and William Dickson was utterly ignorant of its effect, as even after its execution he considered himself proprietor of the estate.

The communication of the draft of the deed to Colonel Dickson was useless. The execution was required and advised by his brother, a lawyer, who had always acted as his confidential and legal adviser. This fact is admitted in various parts of the pleadings of the respondent, who seems to take credit for his exertions in that capacity. In fact, the respondent was the very person to whom he would have applied for advice, whether he should sign any such deed or not. Such was the character in which the respondent had, even by his own account, uniformly acted; and he cannot point out a single circumstance tending to show that he had renounced that character in this transaction. He cannot pretend that he ever suggested to William Dickson the propriety of resorting to any other professional person for advice as to the expediency of the deed. He took upon himself to advise his brother and client to execute a deed, by which, divesting himself of the fee of his own estate, he was made to convey the fee of that estate to his adviser, and to sacrifice to that adviser every right which the character of fiar could confer upon him. This is one of the cases where fraud is necessarily

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implied. It is not enough for the respondent to say, as in the case of parties bargaining with each other, that the deed was executed without compulsion, and that the grantor must be held to have satisfied himself of its prudence and necessity. His responsibility extends farther. In his character of adviser, he is bound to substantiate the soundness of the advice by which it was procured, on pain of incurring the penalties of fraud or breach of trust. It is upon this admitted principle, that various acts, which, between unconnected parties, would be considered perfectly indifferent, are held necessarily to imply fraud on the part of agents, and other confidential persons, who may have derived benefit from those acts at the expense of the person by whom they are trusted. In this case, the brother and professional adviser of the disponent has converted the influence which those united characters conferred upon him, into the means of obtaining the execution of a deed in his own favour, and injurious to the grantor.

It is argued, that the deed under reduction, so far from affording any presumption of fraud, was in itself perfectly rational and proper; that William Dickson had, by the various partial sales, incurred an irritancy under the entail 1776, and consequently exposed himself to a declaratur of contravention at the instance of the respondent, the next heir under that entail. Accordingly, the deed under reduction states in its narrative, as the consideration of granting it, that William Dickson had exposed himself to such declaratur of contravention; and that the respondent had agreed neither to object to the sales

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already made, nor to pursue any such action of declaratur. But the sales made by William Dickson were beyond the reach of any challenge at the instance of the respondent, and William Dickson was exposed to no risk of forfeiture at his instance. The validity of the sales, notwithstanding the entail 1776, was the subject of the action of declaratur in 1786, by William Dickson against the heirs of entail. It was decided in that case, that the debts contracted by William Dickson were good against the estate, and that the suspension offered by the purchaser, on the ground of the sale being challengeable, was unfounded. By that decision, the freedom of William Dickson from the penalties of contravention was established by necessary implication, otherwise his title to prosecute such an action could never have been sustained.

In the case of Stewart against Agnew*, decided in March 1784, upon the authority of which the respondent himself admits that the decision of 1786 rested, the inefficacy of an entail to warrant the infliction of the penalties of contravention against the entailer, though nominally subjected to the fetters, was unequivocally recognised. In that case the question at issue was, whether or not an entail imposing upon the grantor, as well as the heirs, restrictions against alienating and affecting with debt, fortified with the usual irritant and resolute clauses, was good against the creditors of the entailer? The Court found that it was not; and the *ratio decidendi*, as appears from the report, was the necessity, in order to exclude creditors, that the

* Mar. 3, 1784. Fac. Coll. No. 150, p. 235.

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right of the contravener should be resolvable, "in which case the statute directs the next heir of tailzie to serve himself heir to him who died last infest in the fee, and did not contravene." "A provision totally inconsistent with the predicament of an entailer imposing restraints upon himself." In short, the debts of the entailer were found in that case good against the estate, upon the very ground that there could be no effectual resolute clause against the entailer; or, in other words, no possibility of declaring a contravention against him, and voiding his right. Accordingly, this very reasoning was adopted in the pleadings for William Dickson, in the action of 1786. In the information presented to the Court in that action, it is maintained, on the part of William Dickson, that the statute 1685, in so far as it afforded a security against creditors, could not apply to the case of an entailer: it is argued*, that by that statute, "in case of contravention, the next heir of tailzie is directed to serve himself heir to him who died last infest in the fee, which shows clearly that the right of the maker of the entail could not thereby be resolved, and yet no entail can be effectual against creditors, without a clause reserving the right of the person contravening."

* Supposing that William Dickson had incurred an irritancy, and exposed himself to an action of contravention, the deed under reduction was itself in fact a gross act of contravention, as it effects a complete alteration of that order of succession which was secured in the former entail, by prohibitory,

* Information for pursuer in action of 1786.

irritant and resolute clauses, as binding as those directed against the alienations of the estate. By the former entail, the destination of the lands is taken to various substitutes, and their heirs male; while, by the new deed, the destinations are taken to the respondent and various substitutes, and their heirs general; so that the respondent's daughters are now called to that succession which was formerly limited to his sons; and secondly, there is an alteration of the substitution, by introducing the daughter of Mr. David Dickson into the order of succession before Mr. Michael Dickson and the heirs male of his body, who stood before her in the former entail. The new deed, therefore, completely perverts the order of that succession in which it is its proposed object to secure the descent of the remaining estate; and thus the deed, so far from securing William Dickson against actions of contravention, necessarily exposed him to such an action at the instance of any heir of the first entail who chose to insist in it. It affords no answer to this, that the new deed under reduction does not stipulate for the whole heirs of entail, and only bears, that John Dickson, the respondent, had renounced his right of action against the grantor; for it is perfectly obvious that the pursuer would not have abandoned his right of property in the estate to purchase the forbearance of one heir, if he had been informed that the very deed containing that abandonment placed him at the mercy of many other persons having an equal title to vacate his right, and of persons who had not only a title, but a strong interest to take that step, as the

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interposition of the respondent's numerous daughters produced as effectual an exclusion of the succeeding substitutes from the benefit of the entail, as if the estate had been alienated altogether by William Dickson.

No professional person, unbiassed by interest, could have advised William Dickson to execute such a deed. Holding an estate in fee under an entail executed by himself, he had obtained, in a former proceeding, a decree against the heirs, finding the estate affectable by his debts; which decree appeared from the pleadings to have been pronounced on the very ground that there was no way of resolving his right. Could a professional person *bonâ fide* advise such proprietor to admit, without discussion, that he had incurred an irritancy by the sales taking place under that decree? Could he advise such a proprietor, by way of purchasing the forbearance of the first substitute, to execute a new entail, which instantly denuded him of the fee of the estate in favour of the first substitute, and at the same time infringed the order of succession of the former entail in favour of the daughters of that first substitute? When the first substitute, himself a professional person, and the legal adviser of the proprietor, is found to recommend and procure the execution of such a deed, the circumstances of the case afford, in legal contemplation, a presumption of fraud, fully sufficient to invalidate the transaction.

The *bonâ fides* of the respondent, founded upon his alleged conviction of William Dickson's liability to a declaratur of contravention, his repeated assertions that that liability was unquestionable, are con-

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tradicted by the tenor of the deed under reduction, and the proceedings which have followed upon it. If the respondent held it to be clear, that William Dickson was just as liable to the fetters of the entail executed by himself, as any of the other heirs,—how came the respondent to accept or act upon the deed under reduction? One of the clauses of that first entail provides, “that it shall not be lawful, “nor in the power of the said William Dickson, or “any of the heirs aforesaid, to alter the said tailzie “and the order of succession thereby established;” and this prohibition is fortified by resolute clauses equally extensive. If the respondent, therefore, conceived it to be absurd to entertain a doubt of the efficacy of the prohibitions of that entail against the acts of William Dickson, the grantor, how did he accept as a valid and effectual deed, the deed now under reduction, which, by altering the order of succession, was just as gross an act of contravention as the former sales by William Dickson? But the respondent not only accepted the deed under reduction, but took infeftment upon it, and actually holds the entailed estate of Kilbucko, as far under this new title. One of the clauses of the former entail, which the respondent affects now to consider as binding, is in the following terms “Also that the said William Dickson, and the whole “heirs of tailzie aforesaid, shall be obliged to possess “and enjoy the lands and estate thereby disposed, “in virtue of the tailzie before mentioned, and of “these presents and infeftments to follow thereon, “and by no other right or title whatsoever.” So that at once the respondent must admit, that

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he himself has incurred an irritancy, and forfeited all right to the estate, unless he assumes that very fact which he elsewhere declares to be absurd, that William Dickson was not bound by the limitations of his own entail, and had power to execute the deed; in which case he must *à fortiori* have had power to sell for payment of debt, without incurring a forfeiture.

The single ground upon which the respondent can maintain the validity of the deed under reduction is at variance with the truth of the narrative on which it proceeds. If he holds that the deed is good for any thing, he virtually admits that the former entail had no effect against William Dickson the grantor, that he had a right to alter the order of succession, and *à fortiori* the right to sell for the discharge of his debts; or in other words, the respondent declares, by his conduct, that he knew the narrative of the deed to be unfounded. The respondent, in answer to this alleges*, that “when the deed in question was agreed upon, the parties had a full and deliberate conversation upon this point, and concurred in disapproving of every entail upon heirs-male, which is always absurd, and generally, at one time or other, attended with the worst of consequences. Though, therefore, the entail in 1776 was on heirs male, yet, as the great objects of that entail were now defeated, it appeared unnecessary, and even foolish, to adopt one of the most unreasonable things which it contained. Accordingly, with the pursuer’s fullest approbation, and by his own direction, the

* Information for Defender, p. 37.

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“ entail was drawn in its present form, which, it is
“ believed, is followed in all modern entails, which
“ are not fettered by the restrictions of the old
“ investitures.”

William Dickson denied that any such conversation had taken place; but if true and correctly stated, that conversation supports the argument of the appellants. The respondent's defence of the prudence and propriety of the line of descent adopted in the new entail, is an evasion of that argument. The appellants refer to that alteration, not merely as an alteration in the respondent's favour, but as showing that the respondent knew to be unfounded that assertion which he assigned in the narrative as the ground for William Dickson's executing any deed at all. They refer to it, as showing that the respondent did not believe William Dickson to be bound by the fetters of the first entail, otherwise he would not have admitted an alteration of the order of succession, which invalidated the second entail, and endangered the right of the respondent himself and all the persons who were to take under it. The appellants do not complain of the respondent's speculative opinions upon the absurdity of limitations to “ heirs male;” but they maintain, as proof of fraud, that when the respondent was canvassing (as he admits, in the above passage, that he did,) the expediency of a new line of descent, he concealed from William Dickson that important fact, which he must have known and believed at the time, that upon the very same grounds which authorized such alteration, William Dickson was not liable to a declaratur of contravention, and therefore was not

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bound, either in necessity or propriety, to grant any new deed, divesting himself of the fee of the estate.

This conversation, as described by the respondent, proves that William Dickson was misled as to the necessity of the new deed; that he was kept in ignorance of its real effect upon his situation; as upon the very grounds that he was authorized to alter the substitution, he must have been enabled to retain the fee without challenge, or dread of declaratur of contravention. If the great object of the entail of 1776 were so much defeated as to warrant a departure from its line of descent, why was William Dickson called upon to execute the new deed at all? And how can the respondent now, justifying that alteration by the authority of "modern" entails, not fettered by the restrictions of the old "investitures," plead *bonâ fides*, when he assigns in the narrative, as the reason for demanding from William Dickson the fee of his estate, that the restrictions of the investiture were in full force? From these circumstances it is clear that the respondent knew to be unfounded those pretended claims, which he assigns in the narrative as considerations for the execution of the deed. The transaction comes within the description given in our law books of those reducible on the head of circumvention. Stair, b. i. tit. 9. § 9; Bankton, vol. i. p. 258. § 62; Erskine, b. iii. tit. i. § 16.

It was a deed injurious to the grantor, and procured from him by the grantee, his brother and legal adviser, either by the concealment of its real object, or upon pretences which, it appears from the

circumstance of the case, the respondent, the grantee, must be presumed to have known, and did actually know to be unfounded.

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On the part of the Respondents,

The first argument pleaded in the name of William Dickson before Lord Balgray was, that the tailzie 1776 was still an obligatory deed, which prevented him from executing any new entail; but this was evidently inconsistent with the very basis of the pursuer's plea: and, accordingly, in Lord Balgray's first interlocutor, his Lordship, in "respect that the pursuer asserted and maintained "that he was unlimited fiar of the estate of Kilbucko, "and had the right of disposing thereof as he thought "proper, finds, that so far as he is concerned, he "had power to execute the deed of entail, dated "24th April 1809." But, further, the right of the substitutes under the former deed, is now most effectually put an end to, in so far as founded upon the first entail; for it is evident, that if the last entail were set aside, then the whole estate was *instantly* alienated from the pursuer himself, and from every other branch of the family. It follows of necessary consequence, that none of the heirs of entail can have any right, because they have no interest, to challenge the present entail, independent of which there will remain no subject of any entail whatever, nor of any succession.

Pursuer's argument on the entail 1776.

The question about William Dickson's powers being thus over-ruled, the appellants then had recourse to an allegation of fraud, which is also specifically repelled in Lord Balgray's second interlocutor.

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It is said that the deed itself contained intrinsic evidence of fraud, particularly in two respects : first, because it reduced the right of William Dickson to that “ of a mere life-rent ;” and, in the next place, because “ it rendered the respondent himself the unlimited fiar of the estate, by omitting “ to impose the prohibition against altering the order “ of succession on him as the institute.”

The latter objection is answered by reference to the entail, in which there is the following clause : “ And with and under this restriction and limitation “ also, that the said John Dickson, and the other “ heirs succeeding to the said land and estate before “ disposed, are and shall be limited and restrained, “ from doing or committing any acts, civil or criminal, and granting any deed, directly or indirectly, in any sort, whereby the lands and estate “ foresaid may be affected, adjudged, forfeited, or “ be any manner of way evicted from the heirs of “ tailzie, or the said order of succession be prejudged “ or changed.”

This clause, with all the other prohibitions and restrictions, is afterwards fortified by an irritant and resolute clause, in the following terms : “ And “ with and under this irritancy, as it is hereby conditioned and provided, that in case the said John “ Dickson, or any of the heirs succeeding to the “ lands and estate before disposed, shall contravene “ the other before written conditions, provisions, restrictions, and limitations herein contained, or any “ of them ; that is, shall fail or neglect to obey or “ perform the said other limitations or restrictions, “ or any of them, then, and in either of these cases,

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“ the said John Dickson, or other person or persons
 “ so contravening, shall, for themselves, amit, lose,
 “ and forfeit all right, title, and interest, which they
 “ have to the lands and estate before disposed, and
 “ such right shall become void and extinct.”

The other prohibitory clause is in these words :

“ And that it shall not be lawful to, nor in the power
 “ of me, or any of the heirs aforesaid, to alter the
 “ present tailzie, and the order of succession there-
 “ by established, or to grant or do any act or deed
 “ which may import or infer any innovation or
 “ change thereof, directly or indirectly, in any sort.”

It might no doubt be said, that the respondent is not an heir, but an institute, and that, therefore, this clause could not affect him ; but the whole of this critical argument is obviated, by attending to the qualification added to the word “ heirs.” The heirs here mentioned are the heirs aforesaid ; and, upon looking back to the preceding clauses, it appears, that the respondent John Dickson is expressly stated and considered as an heir. Thus, immediately after the dispositive clause, the prohibitory clauses are introduced as follows :

“ But with and under the conditions, provisions,
 “ restrictions, limitations, clauses prohibitory, irri-
 “ tant and resolute declarations and reservations
 “ after written, but with and under these conditions
 “ always, that the said John Dickson, and the other
 “ heirs succeeding to the said lands and estate, shall
 “ be obliged to use and bear, and constantly retain,
 “ in all time hereafter, the surname of Dickson, title
 “ and designation of Dickson of Kilbucho ; and with
 “ and under this condition, that I, during my life-

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“ time, and thereafter the other heirs of tailzie
 “ aforesaid, shall be obliged to pay annually the
 “ feu-duties, cess, stipend, and other public bur-
 “ dens and taxations to which the said lands and
 “ estate are liable.”

When these clauses, in which it is unquestionable that John Dickson is described as one of the heirs, are connected with the words in the subsequent clause, “ the heirs aforesaid,” it is perfectly clear that the words “ heirs aforesaid” include John Dickson as well as the other heirs in the previous clause. In every view, therefore, the argument, on which so much stress has been laid, proceeds upon a mistake in point of fact.

As to the argument for the appellants, concerning the restriction of W. Dickson’s right to a life-rent :

In the memorial, which was the first paper for William Dickson, the following passage occurs:—

“ Although he admits the deed of entail, executed
 “ by him in the year 1809, to have been executed
 “ by him voluntarily, without any kind of compul-
 “ sion, but merely at the request of, and to give
 “ satisfaction to his brothers and other near relations,
 “ yet he had not the most distant conception that
 “ the deed so executed by him was of the import
 “ and tendency, and was followed with the legal
 “ consequences which now, upon its being examined
 “ by persons of legal knowledge, turns out to be the
 “ case. He did not intend to deprive himself of
 “ those powers over his own property which belonged
 “ to him by law.”

This passage consists of two different points, viz. :
 first, an admission as to the execution and pur-

poses of the deed ; and, secondly, an alleged misunderstanding of its import.

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The first of these admits that the deed was voluntarily executed by the pursuer, in order to satisfy his brothers, and other near relations. But it may be asked, what satisfaction could it possibly give, if it did not restrain William Dickson from contracting debts, and selling the estate ? And how could this be done, except by restricting him to a right of life-rent ? By the entail of 1776, every restriction which was at that time thought necessary, or even possible, was imposed upon William Dickson, to prevent him from affecting or alienating the estate. And, according to the ideas which were then entertained of the law by the learned arbiters, and by every person concerned, that deed was completely effectual for the purpose. But after the decision in the case of Sheuchan,* which came to be applied to the present case, it was understood that the only way of securing the estate against William Dickson's debts was by restricting him to a life-rent. This, therefore, was necessarily the object of the deed 1809 ; and it was impossible that any thing less could give the smallest satisfaction to the relations of the family.

With respect to the second part of the paragraph, that W. Dickson did not know the import or the tendency of the deed which he executed, and that he did not mean at all to deprive himself of his powers over his property, no statement can be more inadmissible or absurd. It is said that he did not know the meaning or consequences of the deed, till it was examined by persons of legal knowledge ; but,

* Post. pp. 340, 341.

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he could not be ignorant of its meaning ; for the very first sentence of the deed is, that it was granted "for the purpose of preventing any further sales of what still remains of the estate." Surely these words are too plain to require the examination by persons of legal knowledge to make the meaning understood.

It was further said, that the narrative of the deed itself was false, and that the respondent knew it to be so ; because, being bred to the law, he could not suppose that W. Dickson, on account of any contravention of the entail 1776, could be challenged by a declaratur of irritancy. But this argument refutes itself. If the respondent had thought the narrative of the deed false, or if he had not, on the contrary, been fully convinced of the truth and justice of that narrative, he could not have agreed to let it remain as it is, because he must, in that case, have foreseen that it might afterwards give a ground of challenge.

The entail, though ineffectual against creditors, was perfectly valid and complete as to the obligation upon William Dickson, so that his contravening the prohibitions which were fenced by regular, irritant, and resolute clauses, necessarily laid him open to the challenge of any heir of entail who chose to bring an action of declaratur for that purpose.

Mr. Cunningham, the purchaser in 1786, was not satisfied with the decree of the Court, even to the extent of finding the estate affectable by the debts ; and therefore refused to pay the price till the respondent concurred in granting the conveyance.

The decision in the case of Vans Agnew of Sheuchan in 1784, upon which alone, as a precedent, the deci-

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sion in the case of Kilbucko in 1786 proceeded, has been under appeal, and is remitted to the Court of Session, where it is again the subject of discussion: so that it is far from being improbable, that the decision will be reversed *. At all events, the present case is independent of whatever may be the ultimate decision in that or any other, where the question is upon the rigid statutory effect of entails, in a question with creditors, and not upon the plain and equitable interpretation of the meaning of the deed, as to the parties themselves. If there could now be a doubt as to the personal obligations of the deed 1776, it would not follow that a transaction which took place where different ideas were entertained, is to be considered as unreasonable and illegal.

The arrangement upon which the present entail proceeded was not only a fair and rational, but even a favourable, transaction to William Dickson. If the case had been stated to any man of business, or of common prudence, in the year 1809, and the question put, whether it would be advisable for the General to run the risk of an action of declaratur of irritancy, by which he might instantly forfeit his right to the estate, as the irritancy was not of that nature which could possibly be purged? Or if he should execute a deed for securing the remaining fragment of the estate from being alienated, reserving to himself an entire life-rent, no person would hesitate to say that the last alternative should be adopted.

Supposing, for the sake of argument, that the

* It has been since reversed.

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matter was still a point upon which there might be a doubt, yet even this hypothetical view, which is the strongest that can be put for the appellants argument, would by no means serve their purpose. A *res dubia* between any parties, and especially between parties so nearly connected, is the proper subject of a transaction which is well known to be one of the most favoured contracts in the law of Scotland. Lord Stair says, "Transactions may be interposed in the matter of all contracts; and it is itself a most important contract, whereby all pleas and controversies may be prevented or terminated; for thereby the parties transacting quit some part of what they claim, to redeem the vexation and uncertainty of pleas. It is, therefore, the common interest, that transactions should be firmly and inviolably observed, which, both by the Roman law and our customs, have been held as sacred and necessary for mens quiet and peace."

Stair, b. 1.
t. 17, § 2.

The respondent certainly never refused his advice to his brother when it was asked; and he may, without assuming any merit to himself, say, that his brother never had occasion to repent his following that advice. But, at the same time, the respondent did in no case pretend to dictate or direct his brother; and, in the present case, he was so far from stating what he did as a matter of advice, that he plainly and directly stated it as a matter of right, in which he was acting not as an adviser, but as a party.

It is argued, that the deed of entail 1809, instead of saving from a declaratur of irritancy, was itself a contravention which created an additional danger. But, in the first place, if the objection had any weight, it

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would be entirely obviated by what William Dickson had done. By the debts he had contracted, and the sale he had made for payment of them, the subject would be completely swept away, in case the present entail were reduced, so that there would remain nothing to be lost by an irritancy upon the one side, or to be gained by a declaratur upon the other. It was therefore incompetent for any heir of entail to pursue such an action. A party having no interest can have no title.

In the second place, it is evident that after the contravention already incurred, by selling so large a part of the estate, the irritancy became altogether unpurgeable, and of course no new irritancy, supposing such existed, could in this respect make the matter either better or worse with regard to William Dickson.

In the third place, it was observed, that the case was mistated by the appellants, when they supposed that the respondent undertook, for the heirs of entail in general, that they would not pursue an irritancy. The preamble of the deed expressly shows the contrary. It refers only to the declaratur of contravention and irritancy, "at the instance of the" said John Dickson, and that the said John Dickson has, for my accommodation, agreed not to object," &c. The compromise was between William Dickson and the respondent alone; and though any challenge by remoter heirs was improbable, the respondent could not make, and therefore did not make, any engagement upon their part.

The deed of entail, made in 1776 in implementation of the decree arbitral, was the only title on

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which William Dickson possessed the estate of Kilbucke; and every condition which it contained was binding upon him. If the action of reduction, at the instance of David Dickson, for setting aside the previous trust-deed of 1767, had been successful, then he would have become unlimited fiar of the estate, and William would have had no right, excepting what David might please to give him, under the fetters of a strict entail. If, on the other hand, the action of reduction had been unsuccessful, then both David and William would have become mere annuitants for 100*l.* each per annum. It was in consequence, therefore, of the arrangement under the direction of the arbiters, and by it alone, that David got the life-rent of the estate, burdened with 250 *l.* per annum to William, and that William got possession of the whole estate after his father's death. At the same time, the most essential part of that arrangement was the preservation of the estate by the entail then executed; and it was only upon the faith of that entail being completely effectual, that the trustees and the heirs substitute under the trust-deed consented to the arrangement taking place. The entail is accordingly ingrossed in the strongest terms that are known in the law or practice of Scotland; and although, in the amicable suit in 1786, it was found that creditors were not bound by any entail, in such circumstances, yet it was always held, that the maker of the deed himself was bound, by every legal as well as moral obligation, to observe it; so that the prohibitory, irritant and resolute clauses, which are all expressly directed against him, must, upon every contravention, by contracting debts, selling

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part of the lands, or otherwise, be the ground of declaring an irritancy, or forfeiture of his right, at the instance of the immediate, or even the more remote substitute under the entail.

Considering the situation in which matters stood at the date of the transaction now in question, there are the strongest grounds for the finding in Lord Balgray's interlocutor, adopted by the unanimous judgment of the Court, that "the execution of the deed of entail 1809, was, under all circumstances, a measure highly proper, prudent and expedient, on the part of the pursuer." The repeated sales by which the estate had been dilapidated, were contraventions of the prohibitory, irritant and resolute clauses of the entail 1776; which are declared to be binding upon William Dickson, as much as upon all the heirs of entail. If this were not the case, the whole proceedings under the plan, suggested and carried into effect by the arbiters, would have been a mere delusion for misleading and disappointing the trustees of John Dickson, and all the members of the family who were interested in the succession. It follows, therefore, of necessary consequence, that when a further sale was proposed in the year 1809, the heirs of entail, and particularly the respondent, as the first of them, might not only have objected to that sale, but, by a declaratur of irritancy, have turned William Dickson out of possession. It was therefore not only a wise and prudent, but a most favourable, transaction for William Dickson; because by it, not only the sale to Mr. Forbes was allowed to be completed, and the price thereof applied in extinction of his debts, but

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the right of challenging or disturbing his possession given up during his lifetime. Supposing the matter to have been doubtful, it was a proper subject for a transaction between the parties ; and transactions as being the most useful, have always been considered as constituting the most sacred and inviolable obligations known in the law. Stair's Institutes, book i. tit. 17. § 2.

The interlocutors appealed from, find that it is admitted by the pursuer, that he voluntarily executed the entail in question ; and this is supported by what appears upon the record. For in the first memorial given in to the Lord Ordinary in name of the pursuer, his words are : “ He admits the deed
“ of entail executed by him in 1809, to have been
“ executed by him voluntarily, without any kind of
“ compulsion, but merely at the request of and to
“ give satisfaction to his brothers and other near
“ relations ;” which admission, when joined to the foundation of the pursuer's plea, that he had full power to execute the deed, corroborates the validity of the transaction.

The mode in which the transaction between the parties was concluded was that which was suggested by the Court, in their opinion upon the action of declaratur in 1786. Though the Court then found, that the first entail in 1776 could not be effectual against creditors, yet they were clear that the intention of the arbiters, and of all parties concerned, was to prevent the estate being affected in any way whatever ; and that in order to accomplish the object in view, the right of William Dickson, as well as that of his father, ought to have been

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restricted to a life-rent. This they held to be the only effectual mode of restraint, while the party was allowed to continue in the right of the estate, and therefore there was but one of two alternatives; either immediately declaring an irritancy, or now restricting the pursuer's right in the manner which it ought to have been from the beginning, to a life-rent. This restriction, as being the most favourable as well as the most amicable mode of adjusting matters, was adopted, and the necessity as well as propriety of the plan was verified by what happened within a few years, and which gave occasion to the attempt then made for disposing of the last fragment of the property.

The allegation of fraud is unfounded : William Dickson possessed an acute natural understanding, had received a liberal education, and been originally educated to the profession of the law as a writer. It is therefore absurd to suppose that he did not understand the meaning of the deed, till it was examined by persons of legal knowledge. The inductive clause in the preamble of the deed, bears, that it was "for the purpose of preventing any further sales of what still remains of the estate :—" Could William Dickson, reading such a preamble, be ignorant that this deed deprived him of the absolute power of disposing of the estate ?

For the appellants :—The Solicitor General, (*Sir Robert Gifford*), and *Mr. J. A. Murray*.

For the respondents :—*Mr. Wetherell*, and *Mr. Charles Warren*.

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In the course of the argument, the *Lord Chancellor*, upon the citation of authorities from the civil law, recognised as the law of Scotland by Stair in his *Institutes*, (*ante*, p. 342.) *De Transactione et Metu litis*, observed, that according to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding; that in case of doubt as to legitimacy, as in *Cann v. Cann* *, an agreement between claimants to divide the property would be valid. It might indeed, in the case under appeal, be a question, whether the parties dealt with equal knowledge of the subject.

The case of *Gordon v. Gordon* † (he said) stood on a different ground, because there was a suppression of a material fact by one of the parties; viz. the private marriage of the father, which the defendant knew, and called a mere ceremony. But the force of the argument in that case was, that the fact, whatever its character might have been, should have been communicated at the time of the agreement. Such communication was held to be essen-

* 1 P. W. 723.

† The bill prayed that articles of agreement executed by the plaintiff in favour of his younger brother, the defendant, J. G. who disputed the legitimacy of the plaintiff, might be cancelled on the ground of fraud. The original hearing was at the Rolls on the 17th December 1816, when an issue was directed upon the question of legitimacy. The re-hearing was at the Rolls on the 9th December 1817. This case will probably be further noticed in the Appendix to the present volume. There is a report (1 Swanston, 166) of a collateral point decided in the case, but it is not otherwise reported.

tial to the fairness and validity of the transaction between brothers, on a question of rights depending upon legitimacy *.

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This case was argued in the year 1819; and, having stood over from time to time for consideration, was affirmed in the year 1820, with no other remark beyond those made upon the hearing of the appeal, than that the *Lord Chancellor* had considered the case frequently, and with anxious attention, and upon the whole could not advise the House to reverse the judgment in the court below.

Judgment affirmed.

19 July, 1820.

* Upon the subject of transactions of compromise, see in addition to the authorities above cited, *Frank v. Frank*, 1 Cases in Chanc. 85; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 590; *Cory v. Cory*, 1 Vesey, sen. 19; *Penn v. Lord Baltimore*, Id. 443; *Taylour v. Rochford*, 2 Vesey, sen. 284; *Stockley v. Stockley*, 1 Ves. & Bea. 23.

SCOTLAND.

SHERIFF'S COURT ; AND COURT OF SESSION.

(Second Division.)

HUGH DUNBAR* - - *Appellant.*
 JOHN AND THOMAS HARVIE - *Respondents.*

A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion upon a question of law, *e. g.* the admissibility of evidence.

The certificate of the secretary of the Board of Excise, as to the accuracy and effect of accounts in the books of the Excise, ought not to be received in evidence.

Whether accounts of stock kept in the Excise books are evidence between third parties, as to the delivery of goods? *Quere.*

Copies of such accounts may be given in evidence. *Semb.* on the ground that the originals are public books:—but in such case, the copies produced must be proved by a witness, who has examined them with the originals, and can swear to their accuracy.

Whether proof *prout de jure* of delivery of goods can be allowed, where, subsequent to the alleged delivery, written statements of account containing partial settlements have been delivered, containing no notice of disputed articles? *Quere.* *Semb.* that in such a case, where the dealing was between a publican and a distiller who kept the accounts, it requires strong evidence of delivery of the goods, to rebut the presumption arising from the accounts delivered.

Whether the account books of the distiller in such a case, afford a *semi-plena probatio*, and lay a ground for the oath in supplement? *Quere.*

The Court of Session having given judgment on the ground of evidence which ought to have been rejected, but some of which evidence was capable of being pro-

* The form of pleading, and the conduct of causes in Scotland being a subject now under discussion, this case is reported more at length than is necessary for the purposes of the report, with a view to exhibit a familiar example of the ordinary course of litigation in Scotland, upon a question of fact, decided in the Court of Session before the passing of the Jury Court Act.

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duced in an unobjectionable shape, and there being other evidence which might sustain the claim; on appeal against the judgment, the case was not remitted; but the judgment was reversed, on account of the small value of the matter in dispute, and the expense which a remit would cause.

THE appellant, who was an innkeeper at Westmuir, was in the habit, during four or five years, of purchasing whisky from the respondents, who were distillers and spirit-dealers "at Yoker."

When the goods were furnished, an invoice or account, specifying the quantity and price, was sent with them. The appellant's wife, who was unable to write or to read writing, was intrusted with the principal management of his business.

The respondents, when they received payments, marked them in the invoices, which was the only voucher or discharge for the appellant.

The transactions between the parties, which became the subject of discussion in the cause, extended from May 1808 to November 1810.

May 3, 1808.
Process, No. 4.

The first invoice or account proved in the cause, (and material to be stated) as delivered by the respondent to the appellant, is in the following terms:

" Mr. Dunbar,		To John Harvie.	
1808.			
May 3.	To balance per account rendered	£. 59	9 6
Aug. 24.	By cash	53	9 6
		£. 6	- -

Process, No. 5.
Aug. 27, 1808.

This balance of 6*l.* was not noticed in the next invoice or account, which was in these terms:

" Yoker, Aug. 27, 1808.	
Bought of John Harvie.	
Mr. Hugh Dunbar,	
62 gallons malt aqua, at 13 <i>s.</i> 6 <i>d.</i>	£. 41 17 -
1808. Nov. 30. By cash	41 17 -
(signed) Tho. Harvie."	

The third invoice is in these terms :

“ Yoker, Dec. 5, 1808.

Mr. Hugh Dunbar,

Bought of John Harvie.

67 gallons malt aquavitæ, at 16 s.	-	-	£. 53	12	-	Process, No. 6.
1809. Mar. 15. By cash	-	-	53	12	-	Dec. 5, 1808.

(signed) *Tho. Harvie.*”

The fourth invoice or account is in the following terms : Process, No. 7.
April 4, 1809.

“ Yoker, April 4, 1809.

Mr. Hugh Dunbar,

Bought of John Harvie.

66½ gallons malt aquavitæ, at 15 s. 5 d.	-	£. 51	10	9
To balance of old account	-	-	20	12 -
				<hr/>
		£. 72	2	9
1809. Aug. 16. By cash	-	-	57	- -
				<hr/>
		£. 15	2	9

At the foot of this account, in the hand-writing of one of the respondents, is the following jotting :

£. 51	10	9
6	-	-
		<hr/>
£. 57	10	9

The cash credited in this last invoice or account was paid to the respondents by the appellant’s wife, and the appellant acquiesced in the charge, as made in the account.

Some months after the delivery of the account last stated, the respondents called upon the appellant to pay the sum of 55 l. 12 s. as the price of a hogshhead of whisky, alleged to have been delivered at his house on the 2d of June 1809, which, through inadvert-

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ence, had been omitted in the statement of accounts. The appellant, denying that he had received the hogshhead in question, and relying upon the accounts delivered by the respondents, as before stated, refused to pay the sum demanded; whereupon the respondents raised an action against the appellant before the sheriff of Lanarkshire, concluding for payment of 481*l.* 16*s.* 6*d.* contained in an account then produced, deducting therefrom the sum of 438*l.* 1*s.* 9*d.* paid in part, and credited in the said account, with interest and expenses. On this account a balance was claimed of 43*l.* 14*s.* 9*d.* which, with the addition of 11*l.* 17*s.* 3*d.* being a balance admitted to have been paid by the appellant, made up the sum of 55*l.* 12*s.* the price of the disputed hogshhead of whisky alleged to have been furnished upon the 2d of June 1809.

The appellant, in his defences, having denied the receipt of the hogshhead of whisky, both parties joined issue in the inferior Court, on the fact that the delivery of the hogshhead of whisky alleged to have been furnished on the 2d of June 1809, was the only point in dispute between them, and created in the balance of accounts the difference already stated.

In this action the respondents craved that the appellant and his wife might be ordained to undergo a judicial examination; and also, that they should be ordained to produce the invoice of the seventh or disputed article of the account.

The appellant and his wife were accordingly ordained to undergo a judicial examination, but the appellant did not appear; and on the 22d May 1811, he

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was held as confessed, and a decree pronounced against him. Against this interlocutor he was afterwards reponed; and subsequently, his wife, Janet Dunbar, gave *a judicial declaration*, in which she declares, "That the declarant and her husband received
 " the whole articles of *aquavita* stated in the account,
 " libelled No. 2. of process, at the prices therein
 " stated, excepting article 7, of date the 2d June
 " 1809, which she denies having received; and
 " she always received invoices from the pursuers
 " with the spirits furnished: That the declarant
 " made no other payments to the pursuers than
 " what is credited in the said account which has
 " been read over to her: that any payments which
 " the declarant made to the pursuers were always
 " marked in the accounts by one of the pursuers,
 " and declares she cannot write; and further declares,
 " that any payments she made were done at Glas-
 " gow: That the declarant has produced all the
 " accounts in her possession relative to the spirits
 " in question, and she never received any account
 " of the spirits mentioned in the disputed article."

The declaration of the defender, Hugh Dunbar, was eventually not required, on a statement made by him that his wife was the person who took the chief management of his public-house, and was better qualified than he was to give an account of the different articles received.

Upon considering the declaration of the appellant's wife, the sheriff pronounced the following interlocutor: " Having considered the declaration 3d July 1811.
 " of the defender's wife, *allows the pursuers a*
 " *proof prout de jure of the disputed article of*

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“ *the accounts, the defender of his defences, and*
 “ *to both a conjunct probation; and grants dili-*
 “ *gence and commission to the clerk of court to take*
 “ *the proof.*”

Against this interlocutor the appellant presented a petition, upon the ground that the memorandums which had been made at the foot of the different invoices, which he was in possession of, must *exclude* the admission of the proof which the respondents proposed to adduce, being parol evidence to contradict an account delivered in writing.

22d Oct. 1811. Upon advising the appellant's petition, the sheriff adhered to the interlocutor complained of, and in order that the appellant's case might receive full and complete discussion, he allowed the sheriff-depute's opinion to be had, after which, the following interlocutor was pronounced: “ Having reconsidered the
 23d Oct. “ petition for the defender, and former procedure,
 “ and advised with the sheriff-depute, adheres to
 “ the sentence complained of.”

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 the Court of
 Session.

5th Mar. 1812. After this interlocutor had been pronounced, the appellant advocated the cause to the Court of Session; it thereafter came before Lord Meadowbank as Ordinary, who, on hearing parties, appointed a condescendence to be given in by the respondents.

14th Nov. This condescendence was followed with answers. Upon advising which, Lord Meadowbank ordained informations to be printed, and laid before the Court. His Lordship at the same time issued the following note:

“ Merchants accounts are put in, to a proverb,
 “ under ‘errors excepted,’ but after so many suc-
 “ cessive settlements as here occur, it seems to be a

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“ novelty to allow an error to be established, as if
 “ every thing were open by entry in the pursuers
 “ books, and a proof, *prout de jure*, of the delivery
 “ of an article of great importance ; this, however,
 “ is done by the sheriff. It strikes the Ordinary,
 “ that, under the analogy of the statute*, a proof of
 “ such error, posterior to settlements made according
 “ to the custom of the parties, ought only to be admitted
 “ by oath, or writ of the defender, if not detected
 “ on the face of settlements with the defender ; for
 “ if this is required after the mere lapse of three
 “ years, *à fortiori*, should it be required where
 “ subsequent accounts have been rendered and settled,
 “ even though within the three years ? The
 “ Ordinary thinks, however, that such a rule of
 “ practice, in a matter of such general importance,
 “ if not already adopted by decisions, ought to receive
 “ the consideration of the Inner House, rather
 “ than of a single Ordinary, before being entitled to
 “ his authority.”

By the informations printed in pursuance of the directions of the Lord Ordinary, the appellant insisted that such evidence as that proposed by the respondents was not admissible ; and referred to the case, reported by Lord Kames in his Dictionary, of Sir Walter Seton and Sir James Cockburn.”

Case of Seton
v. Cockburn,
Dict. ii. 135.

The respondents, in their information, argued, that the single point for the consideration of the Court was, whether the hogshead of whisky in dispute had been delivered to the appellant or not ? And they pleaded, in point of law, that they were

* Scots Stat. of Limitations, 1597, c. 83.

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entitled to establish this fact by parol evidence of their servants and clerks.

The respondents further contended that there was a difference between the case quoted and that in dispute, in the one the last account was signed by both parties, whereas, in the other, it was signed by only one of them; and that there were special circumstances in this case, which took it out of the general rule. They referred to entries* in their own books, and in the excise books, and other evidence which was contained in their information†. They further averred, and offered to prove, the *actual delivery* of the whisky in question into the appellant's premises, the Court below being of opinion, that this was necessary to make out their case.

Interlocutor
10th Dec
1813

On the 10th December 1813, the Court pronounced this interlocutor: "Upon report of Lord Meadowbank, and having advised the mutual informations for the parties, the Lords before answer ordain the pursuers to put in a condescendence, in terms of the act of sederunt, of the facts and circumstances which they aver and offer to prove in respect to the delivery of the whisky in question, and that *quam primum*."

The respondents accordingly gave in a condescendence, by which they undertook to prove,

Primo, That the cask intended for the whisky to be sent to Hugh Dunbar, and which he disputes, was cleaned, prepared, and filled by one of their workmen.

Secundo, That their clerk, who made the entries in the books, (already before the Court,) saw the

* See the Appendix

† See the Appendix to this case

whisky measured, and saw it placed upon the cart.

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Tertio, That the hogshead of whisky^{*} was actually conveyed to the house of Hugh Dunbar, and there delivered, along with the invoice and necessary *permit*, by the carters; who at the same time delivered a cask to Andrew Tennent, who lives a short distance farther, on the same road.

Quarto, That this permit was given up by Dunbar, in the usual manner, to the excise officer of the district, and was regularly transmitted to the permit examiner in the excise-office. It is proved by a certificate^{*}, under the hand of Alexander Mitchell, permit examiner, that on the 2d of June 1809, a permit was granted for the removal of one cask, containing seventy-two gallons, *aquavita*, and was credited in Mr. Dunbar's stock in the excise books.

Quinto, That the excise officer of the district examined the stock in hand in Dunbar's cellar, compared it with the permit received, and made the necessary and usual return *to the officer of the district*, in whose books the disputed hogshead or whisky is accordingly entered. This is proved by certificate[†], where the entry appears, "Hugh Dunbar, Westmuir, 2d June, seventy-two gallons."

Sexto, The excise officer on the 12th, and the supervisor of the district on the 28th of June 1809, examined and surveyed Hugh Dunbar's stock in hand; the latter comparing and checking off as correct the officer's survey. This is proved by a certificate[‡], subscribed by the supervisor, Alex-

* See Appendix, p. 387.

† See Appendix, p. 389.

‡ See Appendix, p. 388.

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ander Williamson; and that there was in Dunbar's possession, "by permit, 2d June, seventy-two gallons *aquavitaæ*." And it is farther proved, that the excerpts contained in this certificate are faithfully taken from the excise books by W. Wintour, diary clerk, who farther certifies, that "the *stock books* from " which these excerpts have been taken, appear to " have been from time to time regularly *examined* " and *checked* by the supervisor for the time, Alex- " ander Williamson, then officiating in Glasgow, " third district."

Lastly, this hogshead of whisky was regularly entered, as at "Dunbar's *debit*," throughout the complete and regular series of the excise books. This is proved by a certificate *, under the hand of Mr. Wintour, diary clerk.

The appellant, by his answers to the condescendence, pleaded, *in limine*, the incompetency of the proposed proof; and made the following objections to the admission of proof of the articles of the condescendence.

Ans. to Art. 1. This article is wholly irrelevant. If there had been a particular cask, which could have been sent to the respondent only, and to no other person, the cleaning and filling such a cask with spirits might create a presumption, that it was at least intended to be sent to the respondent; but when the pursuers aver that the cask was prepared and filled by their workmen, they aver nothing specific, but what must occur with regard to every cask in their possession.

Ans. to Art. 2. This article shows how far the pursuers can venture to go, in order to be allowed a proof. They

* See Appendix, p. 390.

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had no clerk at the time when it is alleged the whisky was sent, one of the pursuers having then performed all the duties of a clerk. That your Lordships may be enabled to judge with what view this article is stated, it is submitted, that the pursuers ought to name the clerk by whom it is asserted they will prove that the whisky was measured, and placed on a cart.

This article exhibits the same fallacy. For to induce your Lordships to believe, that several witnesses can be adduced to prove the delivery, the pursuers speak of *the carters*, though only one could have been necessary to take care of a single cart; and it is submitted, that they ought to say who the alleged “carters” are. Ans. to Art. 3.

In point of fact, the defender states that no cask of whisky from the pursuers was delivered, either to himself or to Andrew Tennent, who is named in this article, on or about the 2d of June 1809; and your Lordships will observe, that if a fraud was committed by one of the pursuers carters, (which it will be shown he could easily commit), the proof proposed by the oath of the carter or carters is just a proof by the evidence of the perpetrator of the fraud.

No permit was given up by the defender to the excise officer of the district. The defender has explained in his condescendence, and repeats, that permits for the district in which he resides were, at the time in question, left in a house in *Camlachie*, without in general being seen by the persons to whom spirits were permitted, and were there received by the excise officer. The certificate by Alexander Mitchell, therefore, proves nothing; for though it Ans. to Art. 4.

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bears that a permit was granted, and *credited* in the respondent's stock on 2d June 1809, twenty such permits might have been given, and the quantities stated to account of the respondent, although not a drop of spirits had been added to his stock; for if the officer finds that the stock on hand of a dealer does not exceed the quantity stated, as permitted in the books, he has no occasion to inquire farther. It is only when there is an excess of stock above the quantity entered in the books as received by a dealer, that there can be any room for presuming illicit trade, and in that case the officer makes a seizure.

Ans. to Art. 5. In point of fact, the proper officer of the district in which the defender lives, at the date of the alleged permit, was not James Cunningham, but ——— M'Vey. It will be observed, too, that though the pursuers firm is "John and Thomas "Harvie," the entry in the certificate here mentioned is, "Thomas Harvie and Company."

Ans. to Art. 6. This article, and the certificate, referred to in it, requires peculiar attention. First, when permits are granted, the quantity in them is always a little less than the quantity actually sent; and in proof of this the defender produces a discharged invoice from George Pinkerton, a respectable dealer in Glasgow, who furnished to the defender, on 25th of May 1809, sixty-six gallons of whisky; but the entry in the certificate, shows that the permit was only for sixty-five gallons. In the same manner, as the disputed article is stated at sixty-nine and one half gallons, the permit should have been a little less; but it bears to be for seventy-two

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gallons. Secondly, by the certificate it appears, that on the 3d of April the defender had on hand twenty gallons; and on the day following sixty-five gallons were added to his stock, making in all eighty-five gallons. But on the 17th April, he had eighty gallons of stock on hand; or, in other words, he had only sold five gallons during the *fortnight*, between the 3d and 17th April. In the same manner, on the 1st May, he had seventy-five gallons on hand; and on the 15th May seventy gallons; thus showing regular sales of five gallons in each *fortnight*. On the 28th of May, the stock on hand was one hundred and twenty gallons; and if the defender had received the disputed cask, there would have been added to this stock sixty-nine and one half gallons, making in whole one hundred and eighty-nine and one half gallons. Now taking the usual rate of sales in a fortnight, being five gallons, the defender's stock on 12th June in that case would have been one hundred and eighty-four and one half gallons; whereas on that date, by the certificate, it amounts only to one hundred and twenty-eight gallons. In other words, on the supposition that he had received the cask in dispute, his sales for the fortnight preceding the 12th of June must have been fifty-seven and one half gallons; that is, more than *eleven times* the sales for each of the three preceding *fortnights*. Thus the certificate furnishes conclusive real evidence, that the disputed cask was not received by the respondent, and entered in his last stock.

Any quantity may be entered in the excise books as added to the stock of a dealer, without the risk of detection, although there has been no actual addition to his stock, all that is requisite being, that the

Ans. to last
Art.

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10th March
1814. First
interlocutor
appealed from.

stock truly on hand shall not exceed the quantity which the excise books purport to have received into it.

On the 10th of March 1814, the Court pronounced this interlocutor: "Upon report of the Lord Justice Clerk, in absence of Lord Meadowbank, and having advised the mutual informations for the parties, with the condescendence for the pursuers, put in by order of Court, and answers thereto, advocate the cause, and before answer grant warrant for letters of incident diligence at the instance of both parties against witnesses, and havers, for proving the several facts and circumstances set forth by them in the said condescendence and answers, and allow to both parties a conjunct probation; grant commission to," &c.

Under the commission issued by virtue of this interlocutor, the following proofs were taken:—

Andrew Tennent depones, That though he was supplied with whisky by the respondents in the year 1809, "he cannot say whether he got spirits from them in the month of June in that year."

Daniel M'Farlane depones, "That he has been about fifteen years in the service of John Harvie, and of John and Thomas Harvie, the pursuers. That for several years preceding the year 1809, and till Martinmas in that year, at which time the pursuers got a place of business in Glasgow, the deponent, and another man of the name of John Russell, carted all the whisky from the pursuers distillery to their customers. That he has on several occasions delivered whisky to the defender, and in particular about the middle of June 1809, as

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“ the deponent thinks, he cleaned a cask at the
 “ distillery, and filled it with whisky for the de-
 “ fender ; and he thinks the cask which he so cleaned
 “ would hold from sixty-six to sixty-eight gallons ;
 “ *that afterwards the deponent delivered the said*
 “ *cask of whisky at the defender’s house in West-*
 “ *muir, and his wife was present when the deponent*
 “ *so delivered it ; that John Russell was not present*
 “ *when he so delivered it, but on the day of the*
 “ *delivery, Russell accompanied the deponent from*
 “ *Yoker to Glasgow ; that the deponent had charge*
 “ *of one cart of whisky, and Russell had the charge*
 “ *of another cart ; that after coming to Glasgow, the*
 “ *deponent and Russell delivered two small casks of*
 “ *whisky to James Taylor, in Blackford’s Wynd ;*
 “ *that after this, Russell and the deponent separated,*
 “ *and the deponent by himself delivered a cask to*
 “ *Robert M’Omish, at the town-head of Glasgow ;*
 “ *and after this, the deponent delivered the cask of*
 “ *whisky at Westmuir to the defender, as before de-*
 “ *poned to ; and while at Westmuir, he delivered*
 “ *another cask of whisky to Andrew Tennent, smith*
 “ *there ; and when he so delivered the cask of*
 “ *whisky at the defender’s house, he gave the invoice*
 “ *thereof, and permit, to the defender’s wife ; that,*
 “ *at this time, Alexander Nisbet, at Knightswood*
 “ *coal-work, acted as clerk to the pursuers, and*
 “ *kept the book in which the whisky delivered to*
 “ *the customers was inserted.”* He further de-
 pones, “ That in general it fell under the deponent’s
 “ department to clean the casks which were to be
 “ filled with whisky for customers ; that the cask
 “ above deponed to was among the last which he
 “ cleaned for the defender : Depones, that there

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“ was some person in the house besides the defender’s
 “ wife, who assisted him to carry the cask through
 “ the house to a back cellar; but who that person
 “ was the deponent cannot say: Depones, that
 “ one of the grounds of his recollection of having
 “ delivered the said cask to the defender in the
 “ month of June, in the year aforesaid, is, that on
 “ the same day he delivered two casks to James
 “ Taylor, as before deponed to; and Taylor, on that
 “ occasion, said to the deponent and Russell, who
 “ accompanied him, that the day being very warm,
 “ he supposed that a bottle of porter would be more
 “ agreeable to them than a dram, and they took the
 “ porter accordingly: Depones, that on no other
 “ occasion does he recollect of having delivered on
 “ the same day whisky to Taylor, M’Omish, Ten-
 “ nent, and the defender*. That he can assign no
 “ particular reason for recollecting having cleaned
 “ this cask for the defender, but at the time when
 “ the said cask was sent to the defender, it was the
 “ deponent’s duty to clean all the casks;” and be-
 “ ing specially interrogated, “ what is the reason for
 “ his specifying the cleaning of this cask in parti-
 “ cular in the month of June; depones, that in
 “ consequence of the dispute about it, his attention
 “ had at different times been specially called to the
 “ period at which he delivered it.” He then men-
 “ tions a conversation which he had on the subject

* Taylor and M’Omish were not examined and their names do not appear in the excerpt of the Excise stock-book printed in the Appendix, p. 388. But it does appear in the excerpt from the day-book of the Respondent’s, Appendix, p. 380, that they are charged with goods on the same day (June 2) as the appellant

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with the respondent Thomas Harvie ; and being specially interrogated, whether or not the conversation he had with Mr. Harvie is one of the reasons for his naming the said month of June, depones affirmatively ; but says, “ that Mr. Harvie did not mention “ to him the time at which the disputed cask of whisky “ was delivered.” It appears also by the depositions, that Mr. Harvie, in the course of this conversation, having mentioned that the deponent on the same day delivered whisky to Taylor, Tennent, and M’Omish, he depones, “ that although he had not “ been informed by the pursuer Thomas Harvie, or “ any other person, he should have recollected that “ on the same day he delivered, as before deponed “ to, whisky to all these persons.”

John Russell depones, “ That, at Whitsunday ^{Purs. proof,} 1810, the pursuers (respondents) got a place of ^{P. 4. E.} business in Glasgow ; that, in the summer before “ they so came to Glasgow, he recollects, that he “ and M’Farlane came to Glasgow with two casks “ of whisky ; that M’Farlane had on his cart two “ casks to James Taylor in Blackford’s Wynd, a “ cask to Robert M’Omish in the town-head, *a cask “ to Andrew Tennent in Westmuir, and a hogshead “ to the defender*, while the deponent had on his “ cart a small puncheon of whisky to Glen and “ Company in Rutherglen, and an ordinary puncheon “ to Thomas Gibson in Calton ; that M’Farlane “ and the deponent went together to Taylor’s, who “ offered them a dram, but the day being warm, “ they preferred a bottle of porter ; that M’Farlane “ wished the deponent to take from his (M’Farlane’s) “ cart the cask for M’Omish, and to go with it to

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“ M‘Omish’s, but this the deponent refused to do, as it was out of his way, and he had a heavier load than M‘Farlane; that the deponent thinks that the said quantities of whisky were delivered in the month of June, in the year aforesaid, as he recollects that at that time he was employed on the farm in hoeing potatoes.”

Purs. proof,
P. 5. C.

Alexander Nisbet depones, “ That in the year 1809, and for several preceding years, he assisted the pursuers in keeping their books;” and an extract or excerpt being taken from the waste-book, and being compared by the commissioner, and found to be correct, the witness depones, “ That the whole entries in the original waste-book contained in the said excerpt are in his handwriting.” *

Def. proof,
P. 3.

Tennent depones, “ That he recollects having been supplied by them (the respondents) with whisky in the year 1809; but he cannot say whether he got spirits from them in the month of June in that year, as some of the invoices which he got from them about that time have not been preserved by him.” Tennent’s wife depones “ conform to the immediate preceding witness, her husband.”

Def. proof,
P. 4.

Def. proof,
P. 2.

John M‘Vey, excise officer, depones, “ That when the deponent was first on the said division, it was the practice of retailers to send the permits of spirits, entering their stocks, to the brewery of Mr. Robert Aitken, in Camlachie, from whence the deponent regularly received them, as he had occasion to be there generally three or four times a day.”

James Cunningham, excise officer, depones "conform to the preceding witness."

Andrew Tennent, depones, "That about the year 1809 *the deponent*, to the best of his recollection, was in the practice of sending the permits, *which he received with the spirits*, sometimes to the brewery of Robert Aitken, in Camlachie, and sometimes to the shop of William Brown, grocer, in Parkhead."

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Def. proof,
p. 4.

"Elizabeth Thomson, his wife, depones "conform to the preceding witness."

John M'Vey depones, "That when visiting the stock of the different spirit-dealers of the division, it is his uniform practice to gauge it; and if he find it less than the stock for which they have credit, their credit in the stock-book is reduced immediately to the quantity actually in their possession."

James Cunningham depones "conform to the preceding witness."

The extracts of *accounts* from the account-books* of the respondents, and the stock-books of the excise, which are subjoined in the Appendix to this case, were also proved under the commission.

The Court, on the 15th November 1814, pronounced the following interlocutor: "On report of Lord Meadowbank, and having resumed consideration of and advised the mutual informations for the parties, condescendence, answers, proof adduced, and whole process, the Lords repel the defences, and decern against the defender for pay-

15th signed.
16th Nov.

1814,
second interlocutor appealed from.

* And it appears that the respondents tendered the oath in supplement, which was refused by the appellants.

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“ ment of the sum of 55 l. 12s. sterling, with interest thereof, from the date of citation in this action, and till payment; find the defender liable in expenses, allow an account thereof to be given in, and remit to the auditor to tax the same, and to report.”

An error of 14 l. in this interlocutor was rectified by consent.

7th July 1815.
Third interlocutor appealed from.

The appellant then presented a petition against the above interlocutor, which being followed with answers, the Court, upon advising the same, being of opinion that the case depended materially on the credit due to the excise books, made a remit to James Bruce, secretary to the Board of Excise for Scotland, to examine those books, and report what credit appeared to him to be due to the entries contained in them. On the 12th of June 1815, Mr. Bruce made the following report:—“ I have considered this petition, and the answers, and I am of opinion, that the surveys mentioned in the excerpts*, engrossed in the answers, have every appearance of being taken from actual gauges of Dunbar’s stock; and that the entries made in those books are held as sufficient evidence of the delivery and receipt of the exciseable articles therein mentioned, and particularly of the hogs-head of whisky in question.”

The agent for the appellant, when this report was put into process, waited upon Mr. Bruce, to inquire how he could, consistently with the known facts of the case, make such a report to the Court. The result of this interview is stated in the following “ note,” which was presented to the Court below :

* See the Appendix.

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“ In this case your Lordships, before answer, remitted
 “ to Mr. Bruce, secretary to the excise, to peruse
 “ the petition and answers, and, if necessary, to call
 “ for the attendance of parties, and to inquire into
 “ the facts alleged by either party with regard to the
 “ excise books and permits mentioned in the plead-
 “ ings, and to report the result of such inquiry to
 “ the Court, and particularly to state how far the
 “ entries in these books can be deemed conclusive
 “ evidence of the delivery of the hogshead of whisky
 “ in question into the stock of the petitioner (ap-
 “ pellant).

“ The petition and answers, with the remit by
 “ the Court, were, by the agent for the pursuers
 “ (respondents), laid before Mr. Bruce, who on the
 “ 12th instant perused the same, and wrote out the
 “ report in process. The agent for the defender
 “ was rather surprised that Mr. Bruce should have
 “ made out a report, *without so much as seeing the*
 “ *disputed entries contained in the stock-book*, kept
 “ for the division where the defender resides, and
 “ *which was then lying in his (the agent's) pos-*
 “ *session*. Accordingly he took the liberty of wait-
 “ ing upon, and mentioning this circumstance to
 “ Mr. Bruce, *who stated to him that the cause ought*
 “ *to have been remitted to the sheriff of the county,*
 “ *to inquire into the facts alleged by the parties, as*
 “ *tending to support or detract from the credit due*
 “ *to the excise books; that he had examined the*
 “ *persons in the excise-office, who made out the*
 “ *excerpts from the books mentioned in the plead-*
 “ *ings, by which he was satisfied that these were*
 “ *fairly taken; and therefore he had no occasion to*

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“ see any books on the subject, because, in his
 “ official capacity, he could never admit that there
 “ was any error in the excise books. Mr. Bruce
 “ further stated, that the practice of *stamping en-*
 “ *tries* has been known to the honourable Board ;
 “ and when the officer was detected in doing so, he
 “ was dismissed from the service.

“ Correct, in so far as relates to the conversation
 “ with, (signed) “ *James Bruce.*”

“ 15th June 1815.”

7th July 1815.
 Second inter-
 locutor ap-
 pealed from.

The Court, of this date, pronounced the follow-
 ing interlocutor : “ The Lords having advised this
 “ petition, with the answers thereto, and report of
 “ Mr. Bruce, as directed by the Court, adhere to
 “ the interlocutor reclaimed against, and refuse the
 “ desire of the petition, with this variation, that the
 “ sum decerned for shall, as consented to by the re-
 “ spondents, be restricted to 43*l.* 14*s.* 9*d.* sterling,
 “ with interest thereof from the date of citation, and
 “ with expenses as formerly found due.”

Against these interlocutors the appeal was pre-
 sented.

For the Appellants, the *Attorney-General*, and
Mr. Wetherell :

Argument,
 May 10th and
 12th.

By the Scotch law, a settled account cannot be
 opened so as to admit proof of error. A party there is
 not permitted, as in the courts of equity in England,
 to surcharge and falsify. Even in those Courts there
 must be a demonstration of error in the accounts;
 suspicion and probability of error is not sufficient.
Clark v. Thirkill *, *Seton v. Cockburn* †.

* Before the Vice-Chancellor, 1820. Not reported. It was
 a common bill to open a settled account.

† Dict. of Decis. vol. 2, No. 135.

1890.

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HARVIS.

As to the excise books, they cannot be evidence as between third persons; if so, any person might be charged to any extent by a collusive entry in the excise books.*

Independently of the excise books, the case of the respondents rests upon the evidence of M'Farlane and Russell. The question related to three deliveries in 1809. They prove only one delivery. To have sustained their case, they should have proved the deliveries in April and August. M'Farlane, having carted all the whisky, could have proved all the deliveries; he only *thinks* that he delivered a cask about the middle of June. It appears in proof. that various other deliveries of whisky took place on the same day. They might have called the persons to whom it is alleged that such deliveries were made, to corroborate the evidence of M'Farlane, which they have omitted to do. Russell speaks only to belief, and proves nothing as to any delivery but one. The excise books prove no delivery to Taylor, M'Omish, &c. on the 2nd of June, as represented by the respondents witnesses.

To the admissibility of the excise books as evidence, there were certainly objections made in the Court below. The excise-officer was not examined, but a person to prove the excerpt from the books, in which there is a material error: it omits an intermediate entry, which shows the danger of admitting such evidence. The permit is delivered to the excise by the person who removes the stock; not by the retailer, who receives it. In point of admissibility, there is no difference between original and con-

* On this point see the authorities in the notes pp. 378, 379.

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firmatory evidence. If the party be dead, as in *Pitman v. Madox**, the evidence is admissible, according to the authority of a class of cases. The admission of the *semiplena probatio*, according to the Scotch law, depends on the circumstances of the case. In the authorities referred to by Erskine † on that subject, the circumstances were very peculiar: the defender being dead, his oath of verity could not be taken, and on this account the oath of the pursuer was admitted. Where there are adverse witnesses, *semiplena probatio* is not admissible; here they have taken the oath of the defender's wife. According to Erskine, "the *semiplena probatio*, or oath in supplement," is to supply an imperfect or defective evidence by the "parties own oaths; *e. g.* in the case "of furnishings made by shopkeepers, &c. where the "quantities furnished, or the prices of them, are "not proved by two concurring testimonies, &c. But "where the imperfect evidence laid before the judge "does not, in his apprehension, amount even to *semiplena probatio*, the parties oaths in supplement "ought not to be put." In this case, the accounts of the respondent were very inaccurate; there were omissions on both sides of the account.

For the Respondents, *Mr. C. Warren*, and
Mr. Stephen :

The defence made by the appellant is not that he has paid for the goods, but that they were not delivered. The evidence to prove that the cask in question was delivered at the house of the appellant is: 1. the entry in the books of the respondents and of the excise; 2. the depositions of the servants of the

* 2 Salkeld, 690.

† B. 4, tit. 2, s. 14.

respondents; 3. the evidence of Mr. Bruce. No objection to that evidence was raised in the Court below, either by the advocates or by the judges. Whatever may be thought of such evidence in England, it is admissible by law in the Courts of Scotland; and this House, sitting as a Court of Appeal from Scotch jurisdiction, must decide by the rules of the Scotch law.

It is admitted, that, according to the authority quoted from Erskine, merchants books are not full evidence; but the law of Scotland in such case admits the oath in supplement. If it be law, however inexpedient, it must be the rule of decision between the parties. The books afford a *sempilena probatio*, which, if supported by one witness, becomes *plena*, provided the books are correctly kept, and the merchant make oath, in supplement, that the transaction is there justly stated*: that proof the respondents have offered, and it has been rejected by the appellant. The invoice delivered to the appellant's wife has not been produced, though required. The word "balance," on which so much argument is built, occurs only in one of the jottings. As to the fact and time of the delivery, M'Farlane could not have confounded June with August. His evidence is confirmed by Russell; and as to the conversation between witness and the party respecting the transaction, it ought not to affect the credit due to the evidence. It is in the necessary and ordinary course of conducting actions. A plaintiff would not act very wisely in bringing an action, and proceeding to trial, without knowing what his witnesses could prove.

The Lord Chancellor.—It is manifest from ob-

* Ersk. Inst. b. 4, tit. 2, s. 4.

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servations of the judges of the Court of Session, appearing in the notes, that if it had not been for the certificate of Mr. Bruce, as to the excise books, they would have decided against the respondents; whether they ought to have done so, is another question. It is difficult to ascertain on what principle the Court referred this point to Mr. Bruce. If, according to law, the Court could have dispensed with the production of the books themselves, on the ground that they were public documents, and could not without public inconvenience have been removed; then they should have required, as to such parts as were material to be given in evidence, copies properly attested and examined. That a court of justice should refer to any man, to know whether a document is or is not evidence, is to me a novelty. If the reference had been proper in itself, the report, considering how it was framed, is by no means satisfactory: Mr. Bruce admits that he did not examine, he did not even see, the books, but only conversed with the excise-officers, and upon their allegations and his own confidence is satisfied, and returns a certificate accordingly. Is it in Scotland, *præsumptio juris et de jure*, that an exciseman cannot be mistaken?

For the Respondents:—It is said that because a subsequent account was settled, the omission to charge the item in question ought to be clearly shown. That demonstrative evidence is necessary to open an account, is an objection not now maintainable. As to *Seton v. Cockburn*, the question was between partners for an account. Balances of former accounts had been brought into subsequent accounts which were settled; under such circumstances the question was, whether the final account included

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the settlement of previous accounts, vouchers having been delivered up? In the present case, no vouchers passed; no formal account was delivered; the papers given in the hurry of business were mere memoranda of an account current, signed only by one party. By the English law, error may be shown even after an account has been settled.

If the demonstrative evidence said to be required in this case means direct evidence, as contradistinguished from presumptive, there is such evidence. The issue is upon a fact, whether a hogshead of whisky was delivered, and it is confined to a question of time. On this point there is the evidence of the man who delivered it to the wife, with an invoice or permit. His evidence is corroborated by another witness. A third witness proves the entry of the delivery in the books. In England, the practice is to prove the delivery by shop-books, and the servant who made the delivery. Upon an action of trover for a gold watch, where the plaintiffs contended that the defendants being watchmakers, with whom he had left the watch for repair, had delivered it to a stranger. The defendants, on the other hand, contending that it was delivered to the person appointed by the plaintiff to receive it. By the production of the shop books, an entry appeared, not in the hand-writing of the shopman, nor made in his presence; but seen by him soon after it was made: that evidence, given by the shopman, was received*.

* 1 Esp. N. P. C. 328, *Digby v. Stedman*. Upon this subject, see *Sikes v. Marshall*, 2 Esp. 705; 7 Jac. 1, c. 12. *Lord Torrington's case*, 1 Salk. 285; N. P. 282, 283. *Cooper v. Marsden*, 1 Esp. 1. *Harrison v. Blades*, 3 Camp. 357. *Calvert v. Arch. of Canterbury*, 2 Esp. 646.

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The Lord Chancellor :—What was the verdict in that case?

For the Respondents :—It does not appear. In another case *, the shopman being dead, the shop-books were of themselves held to be evidence of delivery. To the evidence from the excise-books, it is objected that nothing but a certificate is produced; but this objection was not raised before the Court of Session; from which a presumption arises, that by the law of Scotland the certificate is good evidence without production of the books. If the objection had been taken, the respondent might have amended his case by producing the books; in England a new trial, on the ground of the admission of improper evidence, if the objection was not taken at the trial. The excise-books were not produced to prove the delivery of the goods, but to show that the permit was delivered by the retailer, Mr. Dunbar, to the officer. M'Vey depones, that the permits are usually left by the retailer.

The Lord Chancellor :—Did you ever hear of a certificate being admitted, such as in this case? The excise books, if they be evidence at all, ought to be proved by the oath of a party who has made or seen a copy, and having compared it with the original, proves it to be accurate †.

See also upon the subject of evidence against third persons, by entries in private and public books, *Pritt v. Fairclough*, 3 Campb. 305. *Hagedorn v. Reid*, 3 Campb. 377. 379. *Higham v. Ridgway*, 10 East 109. *Doe v. Robson*, 15 East, 32. *Goss v. Watlington*, 3 Bro. & Bi. 132; *ex parte Taylor*, 1 Jac. & Wa. 483. *Hunt v. Andrews*, 3 Bar. & Al. 341; *Wynne v. Tyrwhit*, 4 Bar. & Al. 376.

* *Pitman v. Madox*, 2 Salk. 690.

† See *Fuller v. Fotch et al. Carthew*, 346. where Holt, C. J.

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For the Respondent :—The appellant is estopped from making that objection, for he has used the books in evidence. It is not to be presumed, from the practice of the English law, or any general principles, that such a certificate is not good evidence by the law of Scotland.

The Lord Chancellor :—We have nothing but this certificate; the books are not before the Court. The judges below think all the other evidence trash, and rely upon this certificate.

For the Respondent :—In England questions are tried by the certificate of the bishop: So of the marshal of the King's host. The evidence of Mr. Bruce was taken by the Court for the behoof of the appellant. If his evidence were struck out, enough would remain to support the case of the respondent.

The Lord Chancellor :—Can you support the second interlocutor of the Court of Session, by which it appears, that on the report of Mr. Bruce they found their judgment, and adhere to their first interlocutor on the foundation of that report? Can these interlocutors be supported in these terms, unless the report of Mr. Bruce is supported?

For the Respondents :—The invoices and receipts are not evidence for want of stamps, according to the statute 48 Geo. III. c. 149. That point has been decided*. The fraudulent intent of the appellant is apparent from his winking at the small overcharge against him in the former account, for fear that, in stirring the question, the greater error against in an action of trespass, admitted in evidence a copy of a conviction by Commissioners of Excise, the original of which was made by entry in their books.

* *Wright v. Shawcross*, 2 B. & A. 501.

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the respondents, and in his favour, might be discovered in the course of investigation.

The Lord Chancellor :—The cause is highly important, as involving difficult questions on the subject of evidence. Now, under the Jury Court Act, an issue would be directed in such a case. If the House of Lords affirm the judgment, it would be considered as a direction, and established as a rule, to admit such evidence (including the certificate) before a jury. The subject, however, is so trivial, that if it were not for the important principle which is brought into question, it would be right to decide the case *instantly*.

If all the interlocutors could be affirmed, that might be satisfactory. But as three of the Judges, who sustain the demand, express an opinion that they could not do so but upon the evidence of Mr. Bruce's certificate, it would be dangerous to affirm a judgment standing upon such ground.

It is contended, that by the law of Scotland all these matters—the parol testimony, the books, the certificates, the excerpts, and even the opinion of Mr. Bruce, are admissible evidence. I ought to be well assured on this point, before I establish such rules of evidence. It is marvellous if such things as the certificate of Mr. Bruce and the excerpts, (produced as they were), can be considered by the law of that country as admissible evidence.

What is truly the rule of law on these points in Scotland, it is highly important to know. Questions of fact, such as we now have to decide, will hereafter come before juries in Scotland, who must be guided by their own law of evidence. It is important, there-

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fore, to ascertain by the present decision, so much of that law as the question involves. If we should affirm the judgment of the Court below, without stating the grounds, the judgment on this appeal would be quoted before juries to sanction the admission of such evidence, including all the particulars which were admitted in this case. If, therefore, in the Court of Session, evidence was admitted which ought to have been rejected, together with evidence properly admissible, we ought to inform the Courts of Scotland what evidence we think admissible, and what ought to have been rejected. If I were to speak as an English lawyer, I should immediately express my opinion without doubt. But as a Scotch lawyer, I am required to consider what part of this evidence ought to be admitted, and what part to be rejected.

Lord Chancellor :—There is a case which stands for judgment, which I am extremely sorry ever to have seen here—it relates to the price of a cask of whisky ; and the question is, whether the judgment of the Court of Session, which has fixed the keeper of a public-house with the price of that cask of whisky, is a judgment which is or is not supported by the evidence given in the cause. What was the real case it is a little difficult to state, What would have been the judgment of the Court of Session upon so much of the testimony which has been looked to in this case, as has about it (if I may so speak) the character of evidence, I do not know ; because it appears to me, that there has been a great deal made use of in this case, as testimony, which has no pretence to

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be considered as evidence that ought to be admitted. Endeavouring to separate so much of the testimony as has not the character of evidence, from so much of the testimony as has the character of evidence, I think, upon what I deem to have the character of evidence, that this case ought to be decided, not in favour of the respondents, but in favour of the appellant; and I am the rather inclined to advise you so to decide, because I am quite certain that if we were to take another course, and which is the only other course that we really could take, namely, to remit back to the Court of Session, to reconsider the case of this cask of whisky, we should put both parties to a very great expense. In the next place, if we did not remit it back to the Court of Session, the consequence of that would be, that the Court would take it for granted that in all similar cases similar testimony was to be received in evidence; taking, therefore, the case, and considering it now upon so much of the testimony as is evidence, I think the respondents here, the pursuers below, have failed in making out, by proof as competent as ought to be offered in such a case, the delivery of this cask of whisky; and that that proof on their part ought to be much more clear than it is in this case; because, as to what is supplied to public-houses, the distillers are in truth the persons who keep the accounts between themselves and these public-houses; and where they have delivered accounts, the import of which is directly against the claims they now make, it would be a very unwholesome thing to apply to the general transactions of such persons, a principles which would call upon your lordships to decide, with respect to written

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documents delivered by themselves, that those written documents did not contain the truth with respect to the delivery. It may have been in this case (I cannot undertake to say positively) that this cask of whisky got to the public-house, but I say there is not evidence in this case to sustain the claim, if you throw out of the case the testimony which ought not to be received. Under the circumstances I can only move your lordships, that this interlocutor be reversed; but that each party should pay his own costs.

Ordered and adjudged, that the interlocutors complained of be reversed, and the defender assolizied.

EXCERPT from the Ledger of Messrs. JOHN and THOMAS HARVIE, Spirit Dealers in Glasgow and Yoker.*

HUGH DUNBAR, WESTMUIR.

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ACCOUNT CURRENT between Hugh Dunbar and John and Thomas Harvie.

Dr. Mr. Hugh Dunbar, Change-keeper, Westmuir,

To John and Thomas Harvie.

1807.									
Dec. 2.	To 66 $\frac{1}{2}$	gallons aquavitæ	at 13/.	-	-	-	£. 43	4	6
1808.									
Feb. 12.	To 68 $\frac{1}{2}$	do.	do.	13/.	-	-	44	10	-
May 3.	To 47	do.	do.	13/6	-	-	31	14	6
Aug. 27.	To 62	do.	do.	13/6	-	-	41	17	-
Dec. 5.	To 67	do.	do.	16/.	-	-	53	12	-
1809.									
April 5.	To 66 $\frac{1}{2}$	do.	do.	15/6	-	-	51	10	9
June 2.	To 69 $\frac{1}{2}$	do.	do.	16/.	-	-	55	12	-
Aug. 17.	To 87	do.	do.	16/.	-	-	69	12	-
Dec. 27.	To 72 $\frac{1}{2}$	do.	do.	16/.	-	-	58	-	-
1810.									
June 18.	To 41 $\frac{1}{2}$	do.	do.	15/6	-	-	32	3	3
							£. 481	16	6
1800.									
April 22.	By cash	-	-	-	-	-	£. 20	-	-
May 4.	By do.	-	-	-	-	-	40	-	-
August 24.	By do.	-	-	-	-	-	53	9	6
Nov. 29.	By do.	-	-	-	-	-	41	17	-
1809.									
March 15.	By do.	-	-	-	-	-	53	12	-
August 16.	By do.	-	-	-	-	-	57	-	-
Dec. 27.	By do.	-	-	-	-	-	40	-	-
1810.									
June 13.	By do.	-	-	-	-	-	100	-	-
Nov. 14.	By do.	-	-	-	-	-	32	3	3
Balance due John and Thomas Harvie							43	14	9
							£. 481	16	6

CERTIFICATE from the Excise Books.

These do certify, That permit was granted for the removal of British aquavitæ, from the stock of Thomas Harvie and Company, of Glasgow, to the stock of Hugh Dunbar, of Westmuir, viz. on the 4th of April 1809, one cask containing 72 gallons aquavitæ; and on the 2d of June 1809, one cask containing 72 gallons aquavitæ; and that both quantities of spirits were credited in Mr. Dunbar's stock, in the excise books.

Extracted from the excise books, at Edinburgh, this 17th day of March 1812, by
 (signed) *Alexander Mitchell*,
 Permit-examiner.

EXCERPTS from Glasgow, Eleventh Division and Third Quarter, Excise Stock-book, kept, amongst others, upon the stock of Hugh Dunbar, spirit-dealer at Westmuir, by James Cunningham, officer of excise; which book includes the 6th of April and 5th July 1809.

EXCERPT from Scheme of British Spirit Permits received by the above-mentioned officer of Glasgow, Eleventh Division, during Third Quarter, as taken from the book before described.

No. of Books and Permit.	From what		To whom sent.	Where.	Date of Permit.	No. of Casks.	Quantity.	Limitation of Permit.	By what Officer granted.
	Collection.	Division.						Days.	Hours.
15 51	Glasgow	5th Brandy	John Fulton	R. Dunsmore	May 31. e. 5.	01	65 Aq.	03	James Morrison.
02 32	Ditto	Leunox Mill	John Freeland	John Paul	June 1. m. 7.	01	30 Ditto	07	James Speers.
06 21	Linlithgow	Craigend	James Miller	John Fisher	May 30. m. p. 11.	01	43 Ditto	30	Alex. Tod.
05 12	Glasgow	Hamilton	William Smellie	Alex. Major	June 1. e. 7.	01	03 Ditto	06	James Jolly.
01 37	Ditto	Patrick	Th. Harvey & Co.	And. Tennent	2d. m. 10.	01	44 Ditto	05	Robert Aitken.
01 88	Ditto	Ditto	Ditto	Hugh Dunbar	2d. m. 10.	01	72 Ditto	05	Ditto.
35 40	Ditto	Glasgow, 2d Bry.	Wilkie and Downs	Alex. Scott	3d. m. 9.	01	130 Ditto	02	D. Campbell.
23 35	Ditto	Ditto, 7th Bry.	Robert Smith	T. Dumbreck	6th m. 11.	01	64 Ditto	01	James Cullen.

The above is a true excerpt made by me from scheme,

Excise-office, Edinburgh, }
December 29th, 1813.

(signed)

W. Wintour, Diary Clerk.

EXCERPT from that part of Eleventh Division of Glasgow Stock-book, for Third Quarter of Year ending 5th July 1809; stating the different Surveys made by the Officer of Excise on the Spirit Stock belonging to Hugh Dunbar, spirit dealer at Westmuir, during that Quarter which included 6th April and 5th of July 1809.

Date of Survey.	Stock Aquavitæ.	Quantities of Spirits brought into Stock, and Date of Permit.	
		Aquavitæ.	Quantity sent out, and Date of Permit. Aquavitæ.
April 3. e. p. 3.	20 gallons transferred from last quarter's book	April	20 gallons
17. m. p. 11.	80 — by permit	4. m. 9. 65	—
May 1. m. p. 11.	75 —		
15. m. p. 10.	70 —		
29. m. p. 10.	120 — by permit	May 25. e. 1. 65	—
June 12. m. p. 10.	128 — by permit	June 2. m. 10. 73	—
26. e. p. 2.	120 —		
28. m. p. 11.	100 — A. W.		

The stock of Hugh Dunbar, in Westmuir, was surveyed by me upon the 28th June 1809.

(signed) *Alex. Williamson, Supr.*

I hereby certify, That the excerpts stated on this and the two preceding pages are faithfully made by me from the excise book, of the date and place therein mentioned.

Edinburgh Excise-office, }
29th Dec. 1813.

(signed) *W. Wintour, Diary Clerk.*

I hereby further certify, That the stock-book from which these excerpts have been taken appears to have been from time to time regularly examined and checked by the supervisor for the time, Alexander Williamson, then officiating in Glasgow, third district.

(signed) *W. Wintour.*

I HEREBY certify, That I have searched those of the excise books, for the year 1809, in which Hugh Dunbar change-keeper at Westmuir's stock of spirits were then kept account of, and find recorded therein a permit dated 2d June 1809, for a cask containing 72 gallons of aquavitæ, purporting to have been sent from the stock of Thomas Harvie and Company, to Hugh Dunbar at Westmuir; that those seventy-two gallons of aquavitæ appear from the above-mentioned book to have been placed in the usual manner at that time to Dunbar's debit, by the then officer, and shown in his stock, on the officer's next succeeding survey, viz. 12th June, year foresaid.

Excise-office, Edinburgh, }
29th Dec. 1813.

(signed) *W. Wintour*, Diary Clerk.

ENGLAND.

WRIT OF ERROR FROM THE KING'S BENCH.

JOSHUA ROWE - - *Plaintiff in Error.*
 ISAAC YOUNG - - - *Defendant in Error*

If a bill of exchange be "accepted, payable at the house of P. & Co." it is a qualified acceptance restricting the place of payment, and the holder is bound to present the bill at that house for payment in order to charge the acceptor of the bill. If he brings an action upon the bill against the acceptor, he must in his declaration aver, and on the trial prove, that he made such presentment; and for want of such averment the declaration was held bad on demurrer.

1830.

ROWE
v.
YOUNG.

THE defendant in error was indorsee and holder of a bill of exchange, which the plaintiff in error, residing at Torpoint, had accepted, "*payable at Sir John Perring & Co.'s bankers, London.*" The bill, when it became due, was not presented at that banking-house for payment. But Mr. Young, having failed to make such presentment, nevertheless brought an action against Mr. Rowe in the Court of King's Bench.

In the first count *, upon which the whole question, both technically and materially, turns, the

* Which was the only count in the declaration upon the bill of exchange; all the others were counts for money for goods sold and delivered, and upon an account stated.

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ROWE

v.

YOUNG.

declaration set forth the words of the acceptance as above stated, with an innuendo or explanation, thus :

“ payable at, &c. *that is to say, at the house of certain persons using in trade, &c. the names, style, and firm of Sir J. P. & Co. bankers, London.*”

In a subsequent part of the same count it was averred, that Rowe, “ by reason of the premises, “ and according to the custom of merchants, became “ liable to pay the money specified in the bill according to the tenor and effect of the bill, *and of his acceptance.*” No allegation of a presentment at Sir John Perring & Co.’s for payment was contained in the first count. To this declaration, upon the ground of this omission in the first count, a demurrer was filed on behalf of Rowe, the defendant in the action*.

The Court of King’s Bench overruled the demurrer upon argument, or rather upon the statement of it, and gave judgment for the plaintiff Young.

Against this judgment a writ of error was brought in the House of Lords, assigning for error the want of averment in the first count, that the bill was presented for payment at the house of Sir J. Perring. The case was twice argued † before the House at

* For thirty years before the argument of this case, the Court of King’s Bench had been in the habit of holding an acceptance payable at a banker’s to be a general acceptance.

† By the *Attorney-General* and Mr. *Wyldes* for the plaintiff; and by Mr. *Holt*, for the defendant in error. The arguments are omitted on account of their length; and if it could have been done with propriety, in a work professing to be a record of important decisions in the House of Lords, the whole case would have been omitted, on account of the increased expense

1820.

 ROWE
v.
YOUNG.

very great length, and with much ability : first, in the ordinary course, and afterwards before the Judges, for the purpose of proposing to them questions of law, for the information of the House. After the second argument, the four following questions were propounded to the Judges :

1. Whether, in this case, the bill of exchange

which double reports of the same case inflict upon that part of the profession who are, or who conceive that they are, obliged to take both sets of reports. In ancient times, when business was less extensive, it was the practice of advocates to attend all the courts indiscriminately ; and, having taken notes of what they heard in the course of their practice, to publish indiscriminately what they so collected. But of late years division of labour has been the consequence of increased business, and reporters, as well as advocates, usually confine themselves to a particular court. Formerly, reporters of cases in Chancery and the King's Bench made no scruple of reporting cases in the Common Pleas or Exchequer ; but since the time when periodical reports of cases in the Common Pleas and Exchequer have been begun, and gentlemen have devoted themselves to attendance in those Courts for the purpose of reporting, no reporter in other courts interferes with the department which they have selected. The case now reported arose in the King's Bench, was removed by writ of error into Parliament, and appears in the ordinary reports of the Common Pleas. If this circumstance had furnished a sufficient reason to exclude a case so important in the principle of decision, so full of acute reasoning and deep research, comprising in the elaborate opinions, delivered by the Judges, so many valuable discussions on doctrines of law, and refined criticisms on points of pleading, not applicable merely to the case under consideration, but of universal application, from the pages of a work where the first inquiry would be made for such a case, it would have been, to the Editor most especially, a great relief to have been spared the unpalatable task of consideration whether such a case, under such circumstances, ought or ought not to be reported.

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v.

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mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co.'s bankers, London, (that is to say) at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring & Co. bankers, London, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?

2. Whether, the said bill having been so accepted as aforesaid, such acceptance is in law to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co. bankers, London; or, as a general acceptance, to pay the same with an additional engagement or direction for payment thereof at that house?

3. Whether, if *A.* draw a bill upon *B.* in favour of *C.* for 100 *l.* and *C.* without the previous authority or subsequent assent of *A.* take an acceptance of the bill for the whole of the 100 *l.* but an acceptance qualified as to the time or place of payment, *C.* could, notwithstanding his taking such acceptance, maintain an action upon the bill against *A.*?

4. Whether, if *A.* were debtor to *C.* in 100 *l.* previous to his so drawing upon *B.* in favour of *C.* to the amount of 100 *l.* *C.* could, upon *A.*'s refusing his assent to an acceptance qualified as mentioned in the above question, maintain an action upon the original debt against *A.* without delivering to *A.* the bill so accepted, in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100 *l.*?

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There was a difference of opinion among the Judges, and they delivered successively the opinions which are printed in the Appendix to this Report. After the Judges had delivered their opinions, the *Lord Chancellor* and *Lord Redesdale* spoke to the following effect :

Lord Chancellor :—The writ in this case was brought on a judgment in the Court of King's Bench, in an action of assumpsit. That action was commenced by special original in Easter Term, 1816. The declaration consisted of a count on a bill of exchange, two counts for goods sold and delivered, three money counts, and an account stated. The breach contains an averment of a special request of payment in the usual form. The error is limited to the first count of the declaration, and that count is thus expressed : “ For that whereas one James “ Meagher, on the 20th December 1815, at Gos- “ port, to wit at London, in the parish of St. Mary- “ le-bow, in the Ward of Cheap, according to the “ usage and custom of merchants, from time imme- “ morial used and approved of within this kingdom, “ made and drew a certain bill of exchange in “ writing, bearing date the same day and year afore- “ said, and then and there directed that bill of ex- “ change to the said Joshua, by the name and addi- “ tion of Joshua Rowe, Esquire, Torpoint, and “ thereby required the said Joshua, two months “ after the date thereof, to pay to his the said “ James's order 300 *l.* for value in account, and “ then delivered the said bill of exchange to the “ said Joshua, which bill of exchange he the said

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“ Joshua afterwards, to wit, on the same day and
“ year aforesaid, at Gosport, that is to say, at London
“ aforesaid, in the parish and ward aforesaid, upon
“ sight thereof, accepted *according to the said usage*
“ *and custom of merchants, payable at Sir John*
“ *Perring & Co.’s bankers, London, (that is to say,)*
“ *at the house of certain persons using in trade*
“ *and commerce the names, style, and firm of Sir*
“ *J. Perring & Co. bankers, London;* and the said
“ James, to whose order the said sum of money in
“ the said bill of exchange specified was to be paid,
“ afterwards, to wit, on the same day and year afore-
“ said, at London aforesaid, in the same parish and
“ ward aforesaid, by his certain indorsement in
“ writing, made and indorsed on the said bill of
“ exchange, according to the usage and custom of
“ merchants, ordered and appointed the said sum
“ of money in the said bill of exchange mentioned,
“ to be paid to the said Isaac, and then and there
“ delivered the said bill of exchange so indorsed
“ to him the said Isaac, of which indorsement the
“ said Joshua afterwards, to wit, on the same day
“ and year aforesaid, at London aforesaid, in the
“ parish and ward aforesaid, had notice, *by reason*
“ *of which said premises, and according to the said*
“ *custom of merchants,* he the said Joshua then and
“ there became liable to pay the said Isaac the said
“ sum of money specified in the said bill, according
“ to the tenor and effect of the said bill of exchange,
“ *and of his said acceptance thereof,* and of the said
“ indorsement so made thereon as aforesaid; and
“ being so liable, he the said Joshua, in considera-
“ tion thereof, afterwards, to wit, on the same day

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“ and year aforesaid, at London aforesaid, in the
 “ parish and ward aforesaid, undertook, and then
 “ and there faithfully promised the said Isaac, to
 “ pay him the said sum of money mentioned in the
 “ said bill of exchange, according to the tenor and
 “ effect of the said bill of exchange, *and of his said*
 “ *acceptance thereof*, and of the said indorsement
 “ so made thereon as aforesaid.

To this count there was the following demurrer :
 “ And the said Joshua, by John Wells Bozon, his
 “ attorney, comes and defends the wrong and injury
 “ when, &c. and says, that the said first count of the
 “ said declaration, and the matters therein contained,
 “ in manner and form as the same are above stated
 “ and set forth, are not sufficient in law for the said
 “ Isaac to have or maintain his aforesaid action thereof
 “ against him the said Joshua, and that he the said
 “ Joshua is not bound by the law of the land to
 “ answer the same, and this he is ready to verify ;
 “ wherefore, for want of a sufficient first count
 “ of this said declaration in this behalf, the said
 “ Joshua prays judgment, and that the said Isaac
 “ may be barred for having or maintaining his afore-
 “ said action thereof against him, &c. ; and the said
 “ Joshua, according to the form of the statute in
 “ such case made and provided, states and shows to
 “ the Court here, the following causes of demurrer
 “ to the said first count of the said declaration, that,
 “ *although it is stated and alleged in and by the*
 “ *said first count of the said declaration, that the*
 “ *said bill was accepted by the said Joshua, and*
 “ *made payable at Sir J. Perring & Co.’s bankers,*
 “ *London, yet it is not alleged or stated in, nor can*

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“ it be collected from, the first count of the declaration, that the said bill was ever presented or shown for payment thereof, either when it became due and payable, or before or since, at the said Sir J. Perring & Co.’s bankers, London aforesaid.”
Then there is a rejoinder and replication.

The demurrer afterwards came on for argument in the Court of King’s Bench, when the Court gave judgment in favour of the defendant in error, that is, by their judgment they asserted that it was unnecessary to state and allege, (that is the substance of it,) in and by the first count of the declaration, that the bill was accepted by Joshua ; in fact, that it was not necessary it should be stated, or capable of being collected from the first count of the declaration, that the bill was ever presented or shown for payment thereof, either when it became due and payable, or before or since, at Sir J. Perring & Co.’s bankers, London.

The writ of error, therefore, raises this question : whether it was or not necessary in this first count of the declaration to allege, or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the bill had been presented, and shown to the plaintiff in error, either when it became due and payable, or before that time, or since, at Sir J. Perring & Co.’s bankers, London? The question, stated in another way, may be thus : whether the acceptance, as set forth in this first count of the declaration, is to be considered a general acceptance, making the party accepting liable to pay every where, together with what in some cases is called an

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expansion of the undertaking ; and in other cases, an engagement or direction, in addition to the general unqualified acceptance to pay, (as the direction in this case to pay at Sir J. Perring & Co.'s) thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to, unless he chooses ; or, on the other hand, whether this, from looking at the terms of the declaration, is what is in law called a qualified acceptance ? Undoubtedly it is very fit this question should be brought to a final decision, because the state of the law, as actually administered in the Courts, is such, that it would be infinitely better to settle it in any way than to permit that sort of controversial state to exist any longer.

It has been correctly stated at the bar, that the Court of King's Bench has been of late years in the habit of holding this to be a general acceptance, with what they call an expansion, or a direction, or an engagement, which introduces not a qualified promise, but a sort of courtesy ; a kind of accommodation between the parties, in addition to the effect of the general acceptance ; which accommodation or courtesy, however, they decide that the holder of the bill is not at all bound to attend to. On the other hand, the Court of Common Pleas are in the habit of holding that this is a qualified acceptance ; that the contract of the party is to pay at the place specified ; and, as in matter of pleading, they deem it a qualified acceptance, the proof must accord with the declaration. They require the plaintiff to aver and prove the presentment at the place stipulated.

The principles of law, as applied to promissory

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notes and bills of exchange, are simple and uniform in common cases. But the Court of King's Bench has held, that if a man promise to pay at a particular place, by a promissory note, the Wellington Bank for instance, the demand must be made there; which presentment is itself in point of law a demand; and the reason alleged is, because the place standing in the body of the note is part of the written contract, and you must declare upon it as it is, and prove it as you declare; yet the same Court decides otherwise in the cases of bills accepted, payable at specified places; and the reason assigned for this is, because the place specified is not in the body of the bill. Some how or other it seems to have been assumed, that not being in the body of the bill it is not to be considered as being in the body of the acceptance: a conclusion which it is extremely difficult, I think, to adopt. If you can infuse qualifications of various kinds, which unquestionably you may, into the acceptance, notwithstanding the generality of the bill as drawn, it seems rather difficult to make out, that if in the acceptance there is a qualification clearly and sufficiently expressed as to place, that such a qualification cannot be introduced into the acceptance as well as any other qualification; qualification as to time, as to mode of payment, as to contingencies upon which you will pay, and various qualifications which will be found in the cases.

The decisions of the Court of King's Bench as to bills accepted, payable at a given place, cannot easily be reconciled with their decisions as to promissory notes, with similar qualifications; and it

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must, I think, be admitted that these decisions of the Court of King's Bench are not all consistent with each other. It may be represented as the opinion of that Court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding. The Court of Common Pleas hold a different doctrine. Upon a question where so many Judges of high professional character and great learning have differed, it is impossible to give an opinion without much diffidence; but it is my duty to state my opinion whatever it may be.

The first question is, whether this is a qualified acceptance? Upon that the twelve Judges have given their opinion, and a great majority of them are of opinion that it is a qualified acceptance. Some of the Judges have given an opinion that it is a general acceptance, with an expansion, direction, or engagement, for the convenience of one or other of the parties; that the acceptance in this case meant, that if the party chose to go to Sir John Perring & Co.'s he would probably there get payment of the bill.

The next question is this: supposing it to be a qualified acceptance, was it necessary to aver the presentment, and to support that averment by proof? Now, upon that question, a great majority of the learned Judges, including those who thought it was a qualified acceptance, say that it is not necessary to notice it as such in the declaration, or to prove presentment; but that it must be considered as matter of defence, and that the defendant must state that he was ready to pay at the place, and must bring the money into Court, and bar the action by proving

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the truth of that defence. A great majority of the Judges are of that opinion. Some of the Judges, (including one who has been most eminent in special pleading,) hold a different doctrine. They are of opinion that the plaintiff must declare upon the contract as it is, and make out his right to sue according to that contract. If that contract engages for payment at Sir John Perring & Co.'s he must make a demand at Sir John Perring & Co.'s, and he must state in his declaration that he has made such demand. The sum of their opinion is this, that the contract being upon a condition precedent, the plaintiff has no cause of action unless he has performed the condition; and further, unless he pleads and proves the performance.

I think I may venture to state, having with great pains read every case upon the subject, that a person may draw a bill of exchange as we are in the habit of drawing a promissory note, payable at a particular place. By the acceptance of such a bill, the acceptor promises to pay at that particular place, and the drawer binds himself to the same qualified contract, in default of payment by the acceptor. But it seems there is a great objection to the doctrine, that if a bill is drawn in general terms the acceptor may alter the contract by giving a special acceptance. The only material question appears to me to be, whether the acceptor has in fact accepted specially. I cannot imagine, that because the contract of *A.* the drawer is general, it is from thence to be reasoned, that I, the acceptor, having an option to undertake, or altogether refuse, the engagement, cannot qualify my acceptance. May I not say to

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the holder of the bill, it is very true the drawer has drawn upon me, and expects me to make myself liable generally, but that is a liability which I do not choose to incur. If you will not take an acceptance at a specified time and place, which my convenience requires, I will not give you any acceptance. That an acceptor may qualify his acceptance is clearly established by cases including almost every species of qualification. If the qualification, as to place, cannot be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever.

I am ready to express my full assent to the doctrine, that where a bill is drawn generally, considering that it is an address to the person who is to accept it generally, because it is drawn generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used; that the acceptance may clearly appear to be qualified or special, which he insists is not general.

Then the first question in this case will arise upon the words, whether this is or is not a qualified acceptance. I really do not know how it is possible to say that this is not a qualified acceptance, I mean independently of the cases which have been decided. If a bill is drawn upon a person resident in London, and he accepts it according to the usage and custom of merchants, payable at his bankers in London, putting for the moment the usage of merchants, and the effect of decided authorities, out of the question,

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can any man read an acceptance in these terms, and say it is not only a contract to pay at Child's, where the funds would be deposited to pay it, but that it was a contract by virtue of which the holder of that bill might arrest the acceptor, and hold him to bail in any part of the world?

I cannot, after the maturest consideration, think that the words used do not clearly show that it was the intention of the party who gave this acceptance to come under an engagement which may be represented as a contract, to pay the bill at Sir J. Perring & Co.'s London, and not to be liable elsewhere.

Then it is said, that the word "accepted" forms the general engagement; and that the words "payable at Sir J. Perring & Co.'s" cannot qualify and cut down the general engagement; and cases are cited which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin, or at the foot of the note. There are such cases of distinction between words in the body of the instrument, which have been held to form part of the contract, and words at the foot, or in the margin, which have been considered and held to constitute only a memorandum. I do not mean to disturb those cases; but I do not understand how it is, that from those cases it is to be inferred, that when the acceptor, *uno flatu*, writes the words, "accepted payable at such a house," the word "accepted" is to be taken to express the whole of the acceptor's contract; and although the sentence is not complete till the whole is written, the latter words are not to be taken as part of it, but are

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to be construed distinctly as a direction, expansion, or engagement.

It appears to me that this is a qualified contract for payment at the place specified.

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The *argumentum ab inconvenienti* has been strongly urged. The mode of reasoning was not quite analagous to the usual modes of reasoning in the courts below. Nor does the argument itself as presented rest on clear probabilities. The case is put in this way: Suppose a bill were drawn on each of the twelve Judges of England, just before they left town to proceed on their circuits, and they had accepted the bills payable at their respective bankers. If it be law that such an acceptance renders them liable to pay any where, the holders of those bills might, undoubtedly, if they pleased, arrest the Judges at their respective circuit-towns, a little to the inconvenience of the administration of justice. It is said no man would think of arresting the Judges. I hope nobody would think of arresting the Judges; but I can feel for mercantile men as well as for Judges. It is a hardship that men should be exposed to the inconvenience of unexpected demands, which are not regulated by their contracts, but by a construction given to their contracts, which they never intended, and have not expressed.

In this very case, (a circumstance which has been little considered) the acceptor lives at Torpoint. Is it a matter of no consequence to the acceptor living at Torpoint, and having his money in London, where the payment is demanded? At Torpoint, perhaps, he cannot pay, probably not without inconvenience. In London he has left a fund in the

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hands of his bankers, for the purpose of payment. Is it no matter of inconvenience that the holder may from caprice (we have heard of such things as men, through caprice, refusing a tender of Bank of England notes,) is it no evil to the acceptor that he should be obliged to bring his money from London, if he foresees that the holder of his acceptance will not demand his money in London, but personally from him the acceptor; or if he cannot foresee whether he will demand his money in London or not, is he to keep money in London, and to have money at Torpoint also, and even about his person, to answer the exigency of the demand, as it may happen to be made at the one place or the other, or wherever he may happen to be when the demand is made?

There is another consideration which does not appear to me to have been sufficiently weighed. If the acceptor promises to pay at his bankers in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the bankers in London, and the funds are deposited there. But if the acceptor is unexpectedly to meet the demand in a distant place, the cost of the exchange and remittance backwards and forwards must be added. Take the case of a gentleman leaving Calcutta and coming to reside in London. Upon his departure he gives a bill of exchange in Calcutta, to be paid there six months after he departs. He arrives in London, not bringing funds to pay that bill; he finds the bill sent home by another ship, and he is arrested the moment he lands. The sum which he pays here,

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(if compelled,) is not the same which he had made preparation for paying, and would have paid in India. It appears, to me, therefore, that even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said, the admission of such special acceptances will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be, that the third and fourth questions were proposed to the Judges by order of the House. The objection urged is, that it may vary the right of the holder against the drawer and previous indorsers, unless he, the holder, gives notices, and does all the acts requisite to preserve their liability. The answer to that objection, as it seems to me, is plain: If once it be admitted that a man may by law accept specially, it is in consequence of the law that these difficulties arise. By deciding that no man shall accept specially a bill which is drawn generally, the difficulty is avoided. But if the law be, that although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder of giving notice to the drawer and previous indorsers, if he intends to keep alive their liability. That inconvenience certainly is not quite so large as if the acceptor refused to accept at all.

Again, it is objected that the rule in question will create great difficulty as it regards the indorsee; that some indorsees become so before and some after acceptance: if he becomes an indorsee before, he may find a special acceptance when he expected to have a general acceptance. But when the bill is indorsed

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to him unaccepted, he does not know whether it will ever be accepted ; and if he does not know that it will be ever accepted, he cannot tell whether it will be accepted generally or whether it will be accepted specially. He knows, therefore, at the time when he takes that bill by indorsement, that he is to look out for such an acceptor as he can find ; perhaps no acceptor, but either a general acceptor or a special acceptor. What there is, in such a rule, inconsistent with law or convenience, I cannot discover.

This being a case in which the law is unsettled, we must resort to principle. If on principle a qualified acceptance may be given, the question is, whether the acceptance in this case is qualified? If it be an acceptance in which the contract of the party is to pay at Sir John Perring & Co.'s, then I state it to be, in pleading, a settled rule, that the plaintiff must declare according to the contract ; he must aver all that the nature of that contract makes necessary. If so, how can it be said it is not to be shown by the demand in the declaration, but must be left to be brought forward by the defence? It appears to me that such a doctrine cannot be maintained.

With respect to the cases which have been cited of bonds, they differ altogether from a contract of this nature. Upon a bond the action is brought for the penalty. It must be, therefore, matter of defence to show that the sum due would have been paid at a particular place provided, for that will appear in the condition of the bond, when the defendant prays oyer of it. The defence consists in alleging performance of that part of the condition,

and that is an excuse for non-payment, so as to throw the costs on the plaintiff. These cases therefore have no application to cases of contract.

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There is another set of cases in which it is said that if there is an antecedent debt the acceptance must be taken to be general. Between the acceptor and the holder there is no antecedent debt. There may be an antecedent debt between the drawer and the acceptor of the bill. I wish it could be asserted in all cases. Accommodation bills have ruined great numbers of men. With respect to the acceptor, it is not true that he must be antecedently the debtor. All the cases of qualified acceptance show the contrary. A man may accept to pay half the bill in money and half in goods. He may accept to pay out of the produce of a cargo consigned to him when that cargo shall arrive in England. In the case of a consinee his acceptance is almost universally qualified. Upon the expectation of cargoes coming from the West Indies, or other places, bills are accepted by consignees, payable in London *

In every view of this case, I must state it as my

* The Lord Chancellor, in the course of his speech, stated, that he did not profess to go through the whole case, or to notice all the arguments. The analogies, of rent payable on the premises, of awards directing money to be paid and received at a place, of bills and notes payable on demand, where no demand is held necessary, are omitted here. On the two first classes, see the arguments for the analogy, in the opinion of Bayley, J. and against it, in the opinion of Wood, B. *post.* in the Appendix. As to the latter case, where demand is part of the contract, yet proof of demand held unnecessary, see *Birks v. Trippett*, 1 Saund. 33, a. ; and the opinion of Bayley, J. *quà supra*.

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opinion, (though with much diffidence, recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do) that this is a contract to pay at Sir John Perring & Co.'s even as the contract is stated in the first count of the declaration, and inasmuch as that count wants this indispensable averment of a presentment for payment, according to the contract; the consequence is, that this judgment must be reversed. I do not think the decision will much affect the commercial world, for it will be easy to adopt forms of words which leave no doubt what is meant. I am perfectly sure, that if there is any inconvenience arising from this proposed decision, those who do not wish to suffer the apprehended inconvenience have nothing to do but to use two or three words, which will guard them from it.

The question is, what is the law settled, or to be settled, upon the contract as set forth in the first count of this declaration? I have already stated in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law. At the same time, I cannot but recollect that I am differing from those whose opinions I greatly respect. I do it with reluctance: But my duty is to express my own opinion.

Lord Redesdale :—I most fully concur in the opinion expressed by my noble and learned friend *. It appears to me, that some of the learned Judges have totally forgotten acceptances for honour, which are not uncommon acceptances. If a person accepts, for the honour of the drawer, payable at a banker's

* The Lord Chancellor.

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in London, all the reasoning, founded on the supposition that the acceptor was debtor to the drawer, vanishes; and I do not observe, that the learned Judges distinguished between the case of an acceptance for honour, and the common case of a bill drawn on the person to accept. It is impossible to say, that if these words were applied to an acceptance for honour, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

Another part of the question which has been adverted to by the noble and learned Lord appears to me of infinite importance; I mean, the acceptance of a bill payable at a different place from the residence of the acceptor. This bill is accepted by a man resident at Torpoint, payable in London, at a certain banking-house. What is it that is asserted to be the effect of his acceptance? that he engages to have money both at Sir John Perring & Co.'s and at his own residence at Torpoint. If he accepted simply, he would engage only to have the money at Torpoint*; but, it is said, that because he accepts with this addition he engages to have the money at both places: this is making him engage for two things instead of one, and it seems to me that it

* *Quære*, Whether, under a general acceptance, he would not be generally liable; that is, in all places wherever he may happen to be resident when the bill becomes due, and is presented for payment. See *Rumball v. Ball*, 10 Mod. 38; and Bayley on Bills, 3d edition, 187. I was apprehensive that my note of this passage was incorrect; but, upon collation with other notes, it is confirmed. The expression intended, perhaps, was, that he *would have accepted payable at Torpoint*.

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must have been his intention to engage for only one, that is, a payment in London; because otherwise he would have engaged for a different thing than that which he engages for by a general acceptance. It is perfectly clear, that money paid at Torpoint and in London are two different things; and if he is liable to be called upon at both places, his liability is rendered more inconvenient.

If it be the true doctrine of law that presentment at a place specified in the acceptance is not necessary, such a doctrine might furnish the means of unfair and fraudulent advantage in dealings between mercantile people residing at different places. Take the case stated by the noble and learned Lord, of a bill accepted, payable in India. Suppose a person accepts a bill payable in India, and leaves funds for the purpose of answering that bill, which is made payable in six months. He comes to London, and there the bill is demanded of him; because his acceptance, according to the proposed doctrine, is general, and the words, "*payable at Calcutta*," do not qualify that acceptance; the consequence of that would be, that the holder of the bill would gain the whole expense of the remittance from India to England, and we know perfectly well that makes a very considerable difference. In a recent appeal*, argued before this House, it is a question whether, in an account of that description, the expense of remittance from India to England is or is not to be allowed; and it is part of the subject of appeal from the decision of the Court of Session in Scotland that

* *Graham v. Keble*, see *ante*, page 126.

the appellant has not been allowed the expense of that remittance*.

It appears to me, therefore, perfectly clear, that if it be law, that the acceptance of a bill payable at a specified place is not a conditional acceptance, it may be used for the purpose of gross fraud, to make the acceptor pay that which he did not mean to pay, a sum which the other parties to the contract never expected him to pay. Many cases might be put as to the West Indies, and other places which were alluded to by some of the learned Judges, and into which it is not necessary to enter.

If the words which have been added to this acceptance are to be taken as nothing in favour of the acceptor, how is it that they have any operation in favour of other parties? If they are not a condition annexed to the acceptance, how is it, that with respect to the drawer of the bill, for the purpose of making a demand against him, and with respect to the indorser, for the purpose of making a demand against him, the holder of the bill must show the application to Perring & Co. in order to entitle him to bring his action?

It is said that this should be shown by plea. The majority of the Judges have been of opinion that it is a qualification of the acceptance, but that the defendant is to take advantage of it in pleading. To do that he is obliged to bring the money into Court; that is to say, he is to do the very thing which in the case of an acceptance in India, for instance, he

* By the judgment since given, the cost of remittance has been in part allowed.

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ought not to be obliged to do—he must bring the money from India to be enabled to do it ; and therefore, the permitting him to take advantage of it, by way of pleading, bringing the money into Court, is not giving him the advantage for which he stipulated *.

Upon these grounds it appears to me that it is infinitely better to hold that these words amount

* *Quære* 1. Whether the defendant might not plead readiness, &c. and bring into Court the sum expressed in the bill, according to the rate of exchange, either at the time when the bill became due, or at the time of paying the money into Court. Suppose, for instance, a bill drawn upon a party resident in Ireland, for 1,300*l.* which he accepts, payable at Dublin ; and afterwards, the acceptor, being in England, is sued for the amount. If, according to law, and the practice of the Court, he might plead that he was ready to pay at Dublin, &c. and pay into Court 1,200*l.* that being the supposed rate of exchange ; the objection, so far, is obviated.

Quære 2. Whether, for the purpose of this argument, there is any difference between remittance and exchange, since the mode of remittance is by exchange. Or if there be any further incidental expenses, as a fair commission to the banker or merchant furnishing the bill, might, or might not, that also become the subject or part of a special plea ; and the real value of the sum expressed in the bill, according to the rate of exchange, minus those incidental expenses, be paid into Court ? If issue were taken upon such a plea, might not the proceeding be in a course similar to that which takes place in an action upon a bill returned protested from a foreign country ? As in the cases of *Auriol v. Thomas*, 2 T. R. 52, upon a bill ; and *Pol-lard v. Herries*, 3 B & P. 335, upon a note, viz. by assessment of a jury. See *Kearney v. King*, 1 B. & A. 301, as to the necessity of setting forth in the declaration, in what country, and currency, a bill is drawn, though it is not necessary to state the value of the currency. *Simmonds v. Parminter*, 1 Wils. 185, 1 B. P. C. 43.

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to a qualification of the acceptance, imposing a precedent condition, which must be shown upon the record ; for the purpose of setting forth truly the acceptance and the performance of that condition must also be averred. Those matters being set forth then, it appears to me that the party is bound to prove that which he has averred in the pleading, which goes to show that the party taking such acceptance has complied with the condition entered into between him and the other party. On these grounds I perfectly concur with the noble and learned Lord that this judgment should be reversed.

Judgment reversed.

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APPENDIX.

ROWE v. YOUNG.

Best, J.
1st Question;
1st branch.

BEST, J. The words "payable at Sir John Perring & Co. bankers, London," qualify the general term "accepted," and render a presentment of the bill at the house of Sir J. P. & Co. necessary; (provided the acceptor had funds at that house on the day on which the bill became due, and Sir J. P. & Co. would have paid the bill;) but I do not think that it was necessary to aver in the declaration, that the bill was presented at that house for payment. If the acceptor would avail himself of the want of presentment of the bill at Sir John Perring's, he must plead to the action brought on it, that he had funds in the hands of Sir J. P. & Co. sufficient to take it upon the day when it became due, and that Sir J. P. & Co. would have paid it, had it been presented at their house; and he must pay the amount of the bill into Court.

The first point to be settled is, whether the terms used amount to such a qualified acceptance, as makes the bill payable *only* at the bankers? or whether they are to be considered merely as giving notice to the holder, that if he will call at the bankers, he may obtain payment without having the effect of compelling him to present the bill at the bankers? or imposing any other duty on him than what is required from the holder of a bill, by a general acceptance.

The holder of a general acceptance must present his bill at the residence or place of trade of the acceptor; the qualified acceptance produces no other effect than that of changing the place of presentment from the counting-house of the acceptor, to the house of the acceptor's banker.

The drawee of a bill may accept it specially; and such acceptance may narrow his responsibility below what it would have been if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions; from which it appears, that the drawee of a bill may limit his responsibility by any conditions which his own circumstances, or the situation of the drawer's funds may render expedient.

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In *Smith v. Abbot**, it was holden that a drawee may accept payable, when certain goods consigned to him are sold; and in *Julian v. Shobrooke*†, when in cash from the cargo of the ship *Thetis*. In *Walker v. Atwood*‡, a bill payable at sight was accepted, payable three months after acceptance, and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question, whether the holder is bound to take such an acceptance, and whether, if he take it without giving notice to the drawer and indorsers, and obtaining their assent, he does not discharge them from all liability; but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor.

Are the words, "accepted payable at Sir John Perring & Co.'s bankers, London," sufficient to express a special acceptance, making the bill payable at that house? They all form one short sentence; the words "payable at" following immediately after the word "accepted," without any break; and as the word "accepted" raises an obligation in the writer to pay the bill when due, the words which follow "accepted" must be considered as confining the obligation to pay at the house of Sir J. P. & Co. What rule of construction allows us to say, that the first of several connected words is to be considered as forming the contract, and that the remaining words, although they seem to express a qualification of such contract, are to have no effect? With what justice can we hold a man to the obligatory part of the instrument which he has executed, and refuse him the advantage of the qualification which he has immediately annexed to it.

It has been said at the bar, that the acceptor is to be presumed to be the debtor of the drawer; that the debtor is liable to his creditor every where; that this liability cannot be narrowed, except by clear and express terms; and that the terms used by this acceptor are not sufficiently clear to narrow his responsibility. I deny that, under the circumstances in which the trade of the world is now conducted, a drawee is to be taken as the debtor of the drawer; but, if he is to be so taken, the drawing a bill for his debt, if it be accepted, restrains the

* Str. 1152.

† 2 Wils. 9.

‡ 11 Mod. 190.

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drawer from claiming his debt at any other time or place (in the first instance) than when and where the bill is payable. Further, I insist, that the terms used in this acceptance are sufficiently clear to fix the place of payment of this bill at the house of the bankers.

It is well known to be the practice of the consignors of goods, to draw on the consignees for the expected proceeds of such goods as soon as the goods are sent. The bills so drawn are often presented before the goods get to the hands of the consignees, and generally before they are sold. The special acceptances, in some of the cases to which I have referred, were evidently made under these circumstances. In those cases, the drawee is no debtor of the drawer; nor can what is said as to the narrowing of a general liability down to a particular liability have any reference to them.

But, suppose the drawee to owe the drawer money, for which the former is liable to be proceeded against at any time and place, and without notice. When the one has drawn, and the other accepted, a bill, the general right to sue which the drawer before had, is, in consideration of the acknowledgment of the debt, and the security given for it by the acceptance, restrained: and the drawer can have no action until the bill is arrived at maturity, and the drawee (if able to pay) has been requested to pay it. I know, as against an acceptor, it is not necessary to aver a prior presentment of the bill; but, although such averment and proof be not required, I cannot persuade myself, that you may arrest an acceptor who has been always ready to pay his bill, without any notice of the person, in whose hands it is. The opinion, that an acceptor may be sued at any time and place, and without any other demand than the writ, has arisen from inattention to the forms of pleading. I shall, presently, endeavour to explain this matter. I am aware, that there is great authority for this doctrine; but no authority, save that of your Lordships, will ever convince me, that it is part of the mercantile law of England. If this be the law, no merchant in the city of London can secure himself against arrests and the costs of vexatious actions. Having money constantly in his house equal to all that he has to pay, and even carrying a like sum with him wherever he goes, will not protect him. According to this doctrine, the debt may be

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sworn to by the holder, previous to any application for payment, and the first demand ~~be~~ made by a sheriff's officer. The acceptor of a bill, seldom knows in whose hands ~~it~~ ~~is~~ when it becomes due; the holder is, frequently, at a considerable distance from the place of payment, and sends his bill to an agent unknown to the acceptor. The acceptor cannot do what other debtors may do, namely, seek out his creditor, and tender him his debt. The law will not require impossibilities; and all that it is possible for an acceptor to do, is to be ready with his money at the time and place of payment.

As to the objection of want of precision in the terms used; let it be recollected, that this is a mercantile contract and, that the loosest of all mercantile contracts is the acceptance of a bill of exchange. By the use of the single vague term "accepted," the drawee engages to pay the bill when it arrives at maturity: there is nothing like precision, nothing like a clear and unequivocal expression of obligation in this term, yet the acceptor is bound by it. Will you require more clearness and precision in the qualification, than in the contract to which it is annexed? But the words, however inartificial, are only capable of one meaning; nor would any man reading the bill, and not puzzled by the decisions of Westminster-Hall, think of putting any other construction upon them, than, that the payment which the acceptor binds himself to make, is to be made at the house of his bankers, and no where else. Suppose, instead of using the word "accepted," the drawee had written "when this bill becomes due, I undertake that it shall be paid at the house of Sir J. P. & Co., bankers;" could any man contend that, according to these words, he would have to be ready to pay it at any other place, than the house of Sir J. P. & Co.? The word "accepted" imports, that, when the bill becomes due, the acceptor undertakes that it shall be paid: surely, the words, "at Sir J. P. & Co.'s" must have the same meaning, when added to the word "accepted," as, when added to other words, meaning nothing more or less than is expressed by the word "accepted." It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his bankers: he has, therefore, no power

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over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose his money: he would lose his money, if he took a check for his bill, and did not present such check in due time. It is decided in the case of *Saunderson v. Judge**, that a memorandum that a note would be paid at the house of Saunderson & Co. was an undertaking, that there should be cash there to pay the note; and an order on Saunderson & Co. to pay it. Such an acceptance as is stated in the question, is treated by all bankers as a draft on them, or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences, as one who keeps any other draft or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails.

With respect to the cases of *Smith v. De la Fontaine*†, *Fenton v. Goundry*‡, and the *nisi prius* decisions which followed those cases; I am far from saying, that the judgments of the Courts upon those cases were wrong; on the contrary, for the reasons which I shall presently offer, I should have concurred in those judgments, although not on the grounds stated by the judges who decided them. As to the *nisi prius* cases, I think it would have been much better for the law, if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting in bank. Of *Smith v. De la Fontaine*, we have only a very short and very imperfect report; it does not appear that Lord Mansfield, or the court of K. B. looked at the acceptance as a written contract, and considered what was the true legal construction of it. They proceeded upon some supposed understanding of the mercantile world, and did not give themselves the trouble of coming to any understanding on the subject. Lord Ellenborough and the rest of the judges seem to have taken the same course in *Fenton v. Goundry*. Where a construction is to be put on a mer-

* 2 H. Bl. 509.

† Bayley on Bills of Exchange, 3d ed. p. 129. note b.

‡ 13 East, 459.

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cantile contract, the Court do right to consider what has been the practice of merchants with reference to such a contract. But care must be taken to ascertain what the practice is; and I cannot think any court warranted by the opinion of one jury in pronouncing, that words which are incorporated in a contract form no part of it. It does not appear that any inquiry was ever made to learn the understanding of merchants on this subject, except by Lord Mansfield in *Smith v. De la Fontaine*.

As to the second branch of the first question; I am aware, that both the King's Bench and Common Pleas seem to agree, that, if the terms of an acceptance are obligatory on the holder to present the bill at the banker's, such presentment must be averred in the declaration. With the greatest respect for those who were Judges of the King's Bench, at the time when those cases were decided, I must say, much confusion seems to have prevailed amongst them on this subject. Lord Ellenborough, in his judgment in the action on the promissory note made payable at a particular place*, answers his own argument in *Fenton v. Goundry*: nor can I subscribe to the propriety of the distinction taken between the effect of the same words in a note and a bill. In an acceptance, the words form a part of the original contract of the acceptor, as much as they form part of the original contract of the maker in a note. In the Common Pleas, the question of pleading does not seem to have been much considered. It was scarcely put to that Court by the argument at the bar, that the question of want of presentment ought to have been made matter of defence. If presentment at the banker's be not a condition, the performance of which must precede the payment of the bill, there is no necessity for averring such presentment in the declaration. By a general acceptance, the acceptor undertakes to pay the bill in London; but it has never yet been thought, that before you can recover against the acceptor, you must show a presentment on the day the bill became due. I cannot distinguish between the time of payment and place of payment, or discover any other difference between a general acceptance and a special acceptance payable at a banker's, than that, in the former case, the acceptor undertakes to have the money to take up the bill at his house of busi-

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* *Sanderson v. Bowes*, 14 East, 500.

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ness, in the latter, at his banker's. If presentment on the day of payment, or at the place of payment, were conditions precedent, the holder, although prevented by causes which he could not controul, must lose his debt, if the bill were not presented on the day of payment, for the condition could not be performed on any subsequent day; and he must be subjected to the same loss, if the banker fails, for not presenting it at the house of such banker, although the acceptor had made no provision for its payment. Such a rule must work injustice, and, therefore, cannot be law. The acceptor, if he would avail himself of the non-presentment of the bill, must show by his plea, that he was ready at the time and place of payment to take it up, but that the holder did not attend; and must bring the amount of the bill into Court. On shewing that a tender of the amount of the bill was prevented by the default of the party to whom it should have been made, the want of tender will be excused. In all cases, a party is excused from doing what he otherwise ought to have done, by shewing that the other party prevented him from doing it. Arbitrators sometimes direct money to be paid on a particular day at Lincoln's-Inn hall; and rents, annuities, and other payments, are agreed to be paid at certain specified times and places. In actions for the non-payment of the money in such cases, it is not usual to aver in the declaration, that the plaintiff attended at the appointed time and place, in order to receive his money: and the early books of entries contain pleas, that the party to pay was at the place with his money, and that he who was to receive did not attend.

2d Question. Upon the second question, I submit, that such an acceptance is to be considered in law as a qualified acceptance, to pay the same at the house of Sir John Perring & Co. and not a general acceptance to pay the bill, with an additional engagement or direction for the payment of the same at that house. I have stated the grounds on which I have formed this opinion, in my answer to the first question.

3d Question. The third question, whether the taking it without the previous authority or subsequent assent of *A.* would prevent *C.* from maintaining an action against *A.*? seems to me to depend on the nature of the qualification in the acceptance. A qualification which may prejudice the drawer, would discharge

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him, if taken without his assent—such as an acceptance postponing the payment of the bill. An acceptance at a different town from that in which the bill was drawn, might have the effect of postponing payment, and also of preventing so early a notice of non-payment as might have been received from the town in which the bill was drawn. No line can be drawn limiting the distance from the place to which the bill is addressed, at which it might be made payable by the acceptance, beyond the town in which it is drawn. A qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer. But I can perceive no prejudice which can arise to the drawer from the holder taking an acceptance which changes the place of payment from the acceptor's counting-house to the house of his banker's, in the same town. I believe that bills so accepted are more easily discounted than those which are accepted generally; and the greatest part of the bills of men in trade are now accepted payable at a banker's. Whoever draws a bill now, knows that, most probably, it will be so accepted. To allow a drawer or holder to make any objection on account of such an acceptance, would be to indulge their caprice, or give them a pretence for calling for their debts before such debts are fairly due. I have considered an acceptance payable at a banker's as merely changing the place of payment from the acceptor's counting-house to the banker's; and not as narrowing a right to demand the money any where, or to sue the acceptor without demand or notice; because I cannot conceive that any such right exists. Bills of exchange are often addressed to a man at a particular house, from which I infer that they are to be presented for payment at such house; and that there he is to prepare himself to pay them. If addressed to him in London, the meaning is, not that the bill may be presented any where in London; but it is presumed that the situation of the acceptor's counting-house is too well known to render it necessary that it should be mentioned in the address of the bill. There is a case in Lord Raymond, in which Lord Holt is reported to have held, that, if a bill be accepted without mentioning the house at which it is to be paid, the holder is not obliged to receive it*; that

* *Mutford v. Walcot*, 1 Ld Raym. 575.

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learned judge could not have thought, that mentioning the house, narrowed the holder's right.

In answer to the fourth question, I submit, that if *A*, on receiving notice from *C*, that the bill was accepted with a qualification as to the time or place of payment, refuses his assent to such acceptance, *C*. may treat the bill as not accepted, and proceed on it against *A*, without delivering up the bill to *A*. If the drawer will not assent to the acceptance, which the person on whom he draws thinks proper to put to the bill, he cannot complain if proceeded against as the drawer of a bill which the drawee has refused to accept. The bill is necessary to maintain the action against the drawer; and, therefore, the holder must be allowed to retain possession of it. *A*. having previously given such a bill for a debt due from *A*. to *C*. the latter is not obliged to declare on the bill, but may bring his action for the original debt.

I hope that what I have stated as legal answers to the questions proposed, will be found to secure complete justice to all the parties to a bill, and to promote the convenience of those who are engaged in these negotiations. By allowing acceptances to be made payable at their bankers, merchants are relieved from the risk attendant on keeping large sums of money in their own houses. By holding that such an acceptance does not make presentment at the banker's a condition precedent, a just debt cannot be lost through accident or the negligence of clerks in not presenting the bill at the proper time and place; nor is a holder obliged to incur the expense and trouble of a presentment, when he is certain that no provision is made for payment: whilst, on the other hand, by allowing the acceptor to plead his readiness to pay, and bring the money into Court, you prevent, by the penalty of costs, vexatious arrests and unnecessary actions. By allowing holders and drawers of bills to object to acceptances which may prejudice their right, but preventing either from refusing an acceptance, which, though not strictly according to the tenor of the bill, cannot possibly affect their interest, the rights of parties are secure, whilst their caprice is made to give way to the convenience of others.

The counsel, both of the plaintiff and the defendant, have enlarged upon the inconvenience to commercial men which is

likely to follow the establishment of what is contended for by the opposite party. There never was a case more free from apprehensions of this kind. Mercantile men only want certain rules upon these subjects. As soon as this House shall have declared what are the proper rules, all Judges will act upon them, and all mercantile men will regulate their transactions according to them. If the rule is established that the acceptor may by his acceptance make his bill payable only at his banker's, but that the words used by this acceptor are not sufficient to express such a qualified acceptance, future acceptors will use terms which express this qualification of their contract more clearly. If drawers apprehend that such an acceptance is likely to occasion a return of their bills as being refused acceptance, they will guard against this by requesting, in the body of their bills, the drawee to accept them payable either at his counting-house or his banker's. Every holder will then know, that he holds their bills subject to their being accepted either generally or specially, and will thus be prevented from returning them for want of a sufficient acceptance.

*Richardson, J.**—This is the case of a bill of exchange, drawn by a person at Gosport, upon a person at Torpoint, requiring him, in general terms, to pay, at two months after date, a sum of money to the order of the drawer, which the drawee has accepted, payable at the house of trade of certain bankers in London. The question is, what effect does such an acceptance produce on the holder, as to the conduct to be pursued by him before he sues, and as to the averments to be inserted in his declaration, when he sues upon the bill? It has not been, and, I think, cannot be denied, that the drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment; and, as he may enlarge or diminish the time, so he may, by his acceptance, fix the place of payment; and, in all such cases, I think it follows, that, as he is no otherwise party to the bill than by his acceptance, the holder is bound to sue him according to his acceptance; for the acceptance is the only evidence of contract as to him. The time or place of payment

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* The statement of the record, and the four questions with which the learned Judge prefaced his observations, are omitted. The two first questions he consolidated.

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expressed in an acceptance is as much a part of the acceptor's contract, as the like expression of time or place in the body of a promissory note is part of the maker's contract; both, I think, are entitled to equal regard in ascertaining the rights of the parties. What then is the meaning of the terms of this acceptance, "Payable at Sir John Perring & Co.'s, bankers, London?" I think the meaning is the same, as if the acceptor had said, "I undertake to pay this bill at the house of Sir John Perring & Co. bankers, London." I think that it is not a general acceptance with an additional engagement or direction as to the place of payment superadded, but, that it is to be considered in law as an acceptance to a certain extent qualified; and, that the legal extent of this qualification is the same as it is in other cases, where a man contracts to pay money at a particular place. It is material then to consider, what is the legal effect of a contract to pay money at a particular place? I apprehend it is this; that the debtor shall stand excused of damages and costs, if he is ready to pay the money at that place, according to his contract; but, that the debt is not lost to the creditor by an omission on his part to demand it there, except, perhaps, in cases where it can be shown that such omission has occasioned damage to the debtor. If so, it follows, that it is not necessary, on the part of the creditor suing for the debt, to aver in his declaration, that a demand was made at the place; but, that the defendant, by way of excuse against damages and costs, must show, that he was ready at the place to pay, but that no one was there on the part of the creditor to receive: and, for this purpose, he must plead a special plea in the nature of a plea of tender, and must bring the money into Court. Such, at least is the general rule, namely, that the money must be brought into Court: though I am not prepared to say that an exception might not arise, if the defendant, in any particular case, could show, that the money had since been lost by the neglect of the creditor to receive it at the time and place appointed. This, I apprehend, is the law in the case of covenants, and of bonds, with or without penalty, for payment of money at a particular place; and of rent, where a particular place of payment is expressed in the reservation; or, where it is not so expressed; in which latter case, the law makes it payable upon the land. I will mention some instances. In an

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action of debt for 28*l.* (*), the declaration stated, that the defendant, by his bill obligatory, sealed with his seal, at London, acknowledged himself to owe to the plaintiff 19*l.* 16*s.* of the money of Flanders, (parcel of the 28*l.*), which 19*l.* 16*s.* were then and still are of the value of 14*l.* of English money, to be paid to plaintiff in the Cold Mart then next following. Then followed an averment, that the Cold Mart was a certain fair held at London, in the parish and ward aforesaid, from the 10th August, 1501, to the 20th September next following. The declaration then sets out another bill obligatory, for other 19*l.* 16*s.* Flemish, equal to 14*l.* English, to be paid at the Paske Mart, with similar averments; and concludes, "yet the said defendant, although often requested, the said 39*l.* 12*s.* of Flemish money, nor the said 28*l.* of English money, has not paid to the plaintiff, but to pay the same to him has hitherto refused, and still refuses." The defendant pleads, that the Cold Mart was a certain fair held at Bruges in Flanders, in parts beyond the seas, without the realm of England, from a certain day to a certain other day, and that the 19*l.* 16*s.* were worth only 60*s.* of English money, and makes a similar averment as to the Paske Mart. He then avers, that he was at the said fairs, called the Cold Mart and the Paske Mart, ready to pay to the plaintiff 6*l.* of English money, if he, the plaintiff, had been there, and willing to deliver to the defendant the said bills; and that neither the plaintiff, nor any one for him, was then there to receive the said 6*l.*; and that he has always since been ready to pay, and brings the same into Court; and concludes with traversing, that the markets were held in London; and also traversing, that the 19*l.* 16*s.* Flemish, were worth 14*l.* English. The replication avers that 19*l.* 16*s.* Flemish were of the value of 14*l.* English; and concludes to the country. Whereupon a jury *de medietate lingue* is awarded. In an action of debt (†), by the abbot of the monastery of *Holy Cross of W.*, the declaration shows a demise of a manor and lands for a year, rendering 40*l.* at *W.* aforesaid, at the four feasts of the year; that the defendant occupied for the year; and that the 40*l.* is still in arrear to plaintiff, *per quod actio accrevit*; and concludes, without alleging

* Rast. 158. b.

† Rast. 175. a.

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a demand at *W.* that defendant has not paid, although often requested. The defendant pleads certain acquittances as to part, and levy by distress for the residue. The plaintiff replies *non est factum*, as to the acquittances, and denies the levy by distress. In an action of debt (*) against executors, the declaration states that the testator, by his bill obligatory, acknowledged to owe to plaintiff 17 *l.* 10 *s.* to be paid in three half years; that is to say, 6 *l.* 10 *s.* at Storebrich fair next, and the rest at other fairs, averring when the fairs were held, and concluding, without alleging demands at the fairs, that testator and executor have not paid, although often requested. The defendant pleads *ne unques* executor. The plaintiff replies. The defendant rejoins. The plaintiff there had a verdict, and judgment. To an action of debt for rent (†), the defendant pleads, that he, on the said day, &c., for the space of half an hour before sunset of the said day, was at the same common dining-hall of Thavies Inn, situate, &c. ready, and offered to pay the plaintiff the said 3 *l.* rent, which he was bound to pay on that day, according to the form and effect of the said indenture; and that neither the plaintiff, nor any one authorised by him, was then there to receive; that he has always since been ready to pay, and brings the money into Court. The replication states, that the plaintiff receives the money, and for damages, protesting to the readiness and offer to pay, replies a subsequent demand and refusal (not alleged to be at the place.) The rejoinder denies the demand. To an action of debt for rent (‡), the defendant pleads (after *oyer* of the writing) that he, on the day in the condition mentioned, for the space of an hour before sunset, and after, was at the said mansion-house in the said condition specified, ready to pay the said 40 *l.* according to the form and effect of the condition; and that neither the plaintiff, nor any one lawfully authorised by him, was then there to receive; *semper paratus*, and *profert in curiam*. The plaintiff replies, that he was there to receive, and traverses that the defendant was there ready to pay. The defendant rejoins, whereupon issue is joined. In

* Rast. 322. *b.*

† Thompson's Entries, 159, pl. 167. et seq.

‡ 2 Modus Intrandi, Pl. Gen. 234.

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Marshall v. Wisdale (*), to an action for 10*l.* rent, the defendant pleads a tender of 9*l.* and that he paid the other 1*l.* for taxes. The plea was held bad, because he did not plead the tender at the place where the rent was agreed to be paid. The Court said, it could not properly be paid any where else. In *Crouch v. Fastolfe* (†), to an action of debt for rent, the defendant pleads, that he was at the place on the day, from before sunrise to sunset, ready to pay, and that the plaintiff, nor any one in her behalf, &c. was there to receive; *semper peratus*, and *profert*. It was held a good plea, though no tender was alleged. These precedents and authorities, with many others which may be found in our old books of pleadings, and especially in cases of rent, which the law makes payable upon the land, seem to me to be strong evidence of what the law is in cases of contract to pay money at a particular place; and to establish two propositions which may be considered as general rules, though, like other general rules, subject perhaps to exceptions under special circumstances. First, that a demand at the place is not a condition precedent to the creditor's right to sue for the money, nor, of course, necessary to be averred in his declaration. Secondly, that the defendant may excuse himself by pleading that he was ready to pay the money at the place appointed; but that, in such plea, he must show that he has always since been ready, and must bring the money into Court. The same law appears to me to be applicable to the acceptances of bills of exchange such as this acceptance is, which I consider to be a contract by the acceptor to pay the money at the place by him expressed. I am aware that this opinion is inconsistent, not only with the cases of *Callaghan v. Aylett* (‡), and *Gammon v. Schmoll* (§); but also with the opinions expressed by the Court of King's Bench in *Saunderson v. Bowes* (||), and acted upon by the same Court in *Dickinson v. Bowes* (¶); and also acted upon by the Court of Exchequer Chamber in *Bowes v. Howe* in error **. The two first mentioned cases, were cases of bills of exchange accepted, payable at a particular place; the three latter were cases of promissory notes, expressed in the body of

* Freeman, 148.

† Sir Tho. Ray. 418.

‡ 3 Taunt. 397.

§ 5 Taunt. 344.

|| 14 East, 500.

¶ 16 East, 110.

** 5 Taunt. 30.

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them to be payable at a particular place ; and, in all of them, a demand at that place was considered as a condition precedent to the holder's right to sue upon them. I have felt the weight of these authorities, and it has not been without much consideration that I have felt myself at liberty now to dissent from them. But, considering that the general question, upon which so much difference of opinion has prevailed, is now before this Court of ultimate resort for a final decision, which must operate as a general rule in all future cases, it is very important, that that rule should be founded on true principles, and as far as is consistent with such principles, that it may be practically convenient. For this reason I have ventured to inquire into the grounds of these decisions. In the cases which occurred in the Common Pleas, I do not find that the point on which my opinion is founded, (namely, that where money is to be paid, at a specified place, it is matter of defence, and that it is, therefore, incumbent on the defendant to show that he was ready at the place to pay,) was fully brought before the consideration of the Court : no authorities, at least, appear to have been cited in support of it. In the case of *Saunderson v. Bowes*, in the King's Bench, which was followed by the cases of *Dickinson v. Bowes*, and *Bowes v. Howe*, with deference, I think, that the Court fell into a mistake in supposing, as they seem to have done, that the rule requiring the defendant to show, by way of excuse, that he was ready with his money at the place appointed for payment, (which rule they admitted in the case of bond under penalty,) was confined to such cases where a penalty was to be excused, and where the defendant was called upon to plead the condition, of which he wished to avail himself. I humbly apprehend that there is no such distinction, and that I have shown by the precedents and authorities before cited, that the same rule equally applies to the cases of single bills, without penalty ; and indeed, as I conceive, to all cases where the contract is to pay money at a particular place. It may be suggested that, if the doctrine, which I have ventured to express, be applicable to the acceptances of bills of exchange, it is extraordinary that no case has occurred, or, at least, that none has been cited, where such a plea has been pleaded by an acceptor. To this I should answer, that probably no case has occurred where an acceptor has been sued without a previous demand of the money, or

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without such circumstances existing as evinced that he was not ready to pay. And this leads me to remark, (though I am aware that convenience alone is not a legitimate ground of decision, unless it be consistent with law) that to require the defendant to aver and prove readiness to pay in the few, if any, cases, where, notwithstanding his readiness, he may be vexatiously sued, rather than to require the plaintiff, in all cases, to aver and prove an unavailing demand, will, as I humbly conceive, be a more convenient as well as a more just rule for both parties, and more merciful to defendants themselves. For if, as the fact is, in almost every case of an action brought against the acceptor of a bill, the defendant has failed to pay from mere inability; to require proof of the previous demand, will only add the expense of one more witness, sometimes brought from a distant part of the kingdom, to the burden, which the defendant was before unable to bear: whereas, on the other hand, if an action, without previous demand, should ever vexatiously be brought against an acceptor, who was really ready with his money at the place appointed according to his contract, he, by pleading his readiness, and bringing his money into Court, may discharge himself from damages and costs, and the plaintiff will justly be punished for his vexation by the payment of costs.

I have one other observation only to make on this part of the case. It may be said, that unless the holder be bound to demand payment at the place appointed, he may demand it at some other place, where the acceptor is not prepared with funds. I answer, that if such a case should occur, I think the acceptor would be entitled to a reasonable time to draw his funds to that place. For this, the case of *Halsted v. Vanleyden* (*), is an authority, where (the defendant having by deed acknowledged that he owed to the plaintiff 111 *l.* and covenanted that the same should be paid by C. at Rotterdam, in Holland, on the first demand that should be made) it was held, on a special verdict, that the plaintiff might make his demand at Dort, which is ten miles from Rotterdam, or in England; but that in such case the defendant ought to have a reasonable time to pay, regard being had to the distance.

* 1 Rol Ab. 443. pl. 5. 20.

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In answering the third question proposed by your Lordships, I think it necessary to distinguish between a qualification as to time, and a qualification as to place. Any qualification as to time, whether the time of payment be thereby accelerated or retarded, which the holder permits to be introduced into an acceptance without the concurrence of the drawer, must, I think, have the effect of discharging the drawer. I think it must have such effect, because it necessarily varies, and must be intended to prejudice his situation, as to the time when he may be called upon to pay on the acceptor's default, and as to the time when he must resort to his remedy over against the acceptor. As to place, I think it is not every qualification of place which may be introduced into an acceptance, without the privity of the drawer, that will necessarily discharge the drawer; but to produce that effect, I think the qualification must be such as must vary, and may be intended to prejudice his situation. For instance, if a bill drawn upon a person in the Temple, be by him accepted, payable at the banking-house of Messrs. Child & Co. at Temple-bar, this, I think, would not have the effect of discharging the drawer. But, if such bill were accepted, payable at Dublin or Amsterdam, this, if taken without the privity of the drawer, would, I think, discharge him: because it would necessarily vary, and might reasonably be intended to prejudice his situation, as to the time when he could receive notice of the acceptor's default, and as to his remedy over against the acceptor. It may be difficult to lay down prospectively a precise rule, applicable to all cases, for defining the degree of distance from the residence of the drawer, at which he may be permitted by the holder to appoint, by his acceptance, the place of payment, without discharging the drawer. I should say, that to produce that effect, the distance must be such as would probably delay the drawer in his receipt of notice of the acceptor's default of payment, or throw some increased difficulty upon him in his remedy over against the acceptor.

4th Question. In answer to the fourth question proposed by your Lordships, I think that in the case put, *C.* might maintain an action against *A.* upon the original debt, without first returning to *A.* the bill drawn by him, *C.* having first cancelled the qualified acceptance offered by *B.* to which *A.* is supposed to have refused

his consent. Such an acceptance, so offered by the drawee, but refused by the payee, because the drawer refuses his consent, is to be considered as no acceptance at all: the bill becomes a dishonoured bill, and consequently, the payee has an immediate remedy against the drawer, either upon the bill or upon the original debt.

Garrow, B. observing that it was well known in the mercantile world, that the Governor and Company of the Bank of England had determined to discount no bills which were not accepted, payable at a banker's, concurred with Best J. and Richardson J. in their opinions and reasons; and referred to them as containing his own views of the case.

Burrough, J.—In answer to the first question, I submit, that the usage and custom of merchants does not require that the drawee shall accept a bill of exchange in any given form. He may accept it by parol, or in writing, he may except it generally; and, if he does so, he is, in the language of some of the cases, generally and universally liable: or, he may accept it specially; and then he is liable according to the tenor of the bill and his acceptance thereof. Whatever the acceptance may be, if an action be brought against the acceptor, the declaration must truly state the acceptance; for, the acceptance contains the terms on which he has agreed to the bill. I am of opinion, that the acceptance is a contract which must be construed, as all other contracts are, according to the intention of the party contracting, to be collected from the nature and words of the contract itself. The acceptance, if special, binds him *sub modo*, and not generally. There is neither hardship nor illegality in this. In the present case, the intention appears to me to have been to do away with the necessity and trouble of a personal application to the acceptor, upon the bill becoming due, and of his keeping money by him to pay it, and to substitute a much more convenient course in the first instance. No holder of a bill, when he goes to the banker's shop, expects to find the acceptor behind the counter: on the contrary, he knows he shall not find him there. On the face of this count, the bill is alleged to have been accepted according to the usage and custom of merchants: yet the doctrine of the case of *Smith v. De la Fontaine*, and other subsequent cases, is, that the acceptor, notwithstanding a special acceptance, is generally and universally liable. This is a doctrine

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to which I cannot subscribe. The effect of such doctrine is, that, notwithstanding a well-known place is pointed out where the money may be obtained, the holder shall be at liberty to arrest the acceptor the moment the bill becomes due, and to turn a special and qualified undertaking into a general one, having very different consequences. It seems, however, to be now conceded, that this doctrine cannot be supported. But, then, it is said, that this special qualified acceptance makes no difference as to the averments in the declaration, except as to the statement of the acceptance. As I understand the acceptance stated in this declaration, I am of opinion, first, that it imports that there is a fund in the hands of the banker to answer the amount of the bill; and, secondly, I say, that this acceptance means to impose and does impose on the holder an act to be done by him, namely, to present the bill at the bankers for payment: if payment is not made on application, the acceptor's contract is broken, and not till then. But the holder must state in his declaration the title to his action, which is, that the bill was presented and not paid, and so his cause of action has arisen against the acceptor.

The case of *Bishop v. Chitty** in no way assists the case of the defendant in error. The underwriting of the order for the payment of the money in that case amounted to an acceptance, and it was declared on as such: the possession of the bill, with the order for payment of it, were, in my judgment, sufficient to throw on the plaintiff the burden of proof, that he had presented the order, and could not obtain payment of it. It was there holden by Lord Chief Justice Lee, to be the plaintiff's loss; for, he said, it was to all purposes a draft, which is always considered as actual payment when a reasonable time to receive it has elapsed. *Smith v. Abbott*† is an instance of a conditional or contingent acceptance, according to which it was incumbent on the plaintiff to state in his declaration, and to prove at the trial, that the contingency had happened. The acceptance was "to pay when goods consigned to him," (and for which the bill was drawn) "were sold." The Court held, that the acceptance was within the custom of merchants; and said, that the plaintiff might have

* Str. 1195.

† Str. 1152.

refused it. The Court said also, "it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods. A man, who is drawn upon at ten days sight, may accept for thirty, though the other might protest the bill." So, in this case I say, it will affect trade, if a man is, at all events, contrary to his intention, to be deemed to have accepted generally, or, if his acceptance in this form is to be so constructed, as to make him liable to be held to bail as soon as the bill becomes due. The fallacy, in this case, seems to me to consist in supposing, that the acceptor has engaged for a personal payment at the bankers. This appears to me to be contrary to the intention and the effect of the acceptance, to be collected from the words of it. Suppose the acceptance to have been in this form "Accepted to be paid by me, if, on application to Messrs Perring & Co my bankers, when the bill becomes due, it shall not be paid by them," there is nothing in the usage and custom of merchants to show that such an acceptance would not have been good. But whether an acceptance be good or bad within the custom, if the party, who leaves the bill for acceptance, receives it back without objection, he must abide by it. If he cannot recover according to the custom, it is his own fault. The acceptor can only be liable to an indorser on an acceptance within the custom. In my judgment, the acceptance in the case before the House is in effect such as I have supposed, that this was the intention of the party, I think there can be no doubt, the words of the acceptance appear to me to manifest it. In *Julian v Shobrooke**, the defendant had accepted a bill on account of the ship *Thetis*, when in cash for the ship's cargo. It appears in the report of that case, that the acceptance was so stated in the declaration, and that the plaintiff averred in his declaration (as I think he was obliged to do) that, on the day when the bill became payable, the defendant was in cash for the said ship's cargo. Thus the plaintiff must have been bound to prove at the trial, because it was part of his case, and it consisted of matter in the affirmative. In the present case, the defendant in error must contend, that if the cause had gone to trial, on proof of the

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acceptance, he would have established a *prima facie* case; for he might have urged, on the plea of *non assumpsit*, that the objection (if any) was on the record. As this record is, the question arises on a special demurrer. I am of opinion, however, that the declaration is substantially defective. First, because a material averment is omitted, namely, the presentment of the bill for payment at the bankers, Sir John Perring & Co. which is matter in the affirmative, and, I think, that it lay on the plaintiff to aver it. Secondly, because the cases referred to in support of the assertion, that the answer was to come on the part of the defendant below, do not support that assertion. The cases supposed were covenant to pay money at a certain place on a certain day: (*ex gr.*) to pay to the plaintiff in an action of covenant 100*l.* on the 1st of August, at or in the common dining-hall of Lincoln's Inn. It is said, that, in a declaration on such a covenant, the plaintiff's breach is good, "that the defendant did not pay the money on the " day, at or in the common dining-hall aforesaid, but neglected * and refused so to do." I admit that this is so; but it is so, because the defendant covenants to do the act personally to the plaintiff at that place; and the breach is, that he did not do it at the day and place, but neglected and refused so to do. This is good in a declaration, which is to be certain to a certain intent in general; and it implies, that the plaintiff was there ready to receive,—the parties having agreed to time and place. If this acceptance had amounted to an engagement by the acceptor to pay personally at Sir John Perring & Co.'s, the case alluded to might have had some weight. But this acceptance is not so, nor, from the language of it, can it be taken to be so meant; but, as appears to me, the contrary was intended, viz. that Sir John Perring & Co. the bankers, were, in the first instance, to be looked to for the money; and that the acceptor was to be resorted to in case of non-payment by them.

I will now shortly advert to the cases more immediately applicable to the subject; and the weight of those cases appears to me to be in favour of the plaintiff in error. The first case, to which I have occasion to refer, is *Smuth v. De la Fontaine* *. In that case, Lord Mansfield is reported to have

* Holt, N. P. C 366. note.

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held, that the words accompanying an acceptance "payable at a particular place," or the words "payable at, &c." were not words restricting or qualifying the acceptor's liability, but rendering him generally and universally liable; and that it was not necessary to prove a demand at the particular place in an action against such acceptor. If this was meant of an acceptance, by which the acceptor personally engaged to pay at a particular place, I should feel no objection to the observation; but, if it was meant to apply to cases wherein the acceptance has no such import, I do not think it law. The next case was that of *Saunderson v. Judge**, which does not affect the question in this cause. There the promissory note was in the ordinary form. It was made by one Sharp, and payable to Wilkinson, or order. At the foot of the note there was a memorandum, that he would pay it at the house of Saunderson & Co. The Court held, that this memorandum was no part of the note. If it was no part of the note, the holder, who was indorsee, was not privy to it: it did not bind him, because it was not transferred to him by the indorsement of the note. In *Parker v. Gordon*†, the bill of exchange was accepted as in the present case; and there the court of King's Bench, consisting of Lord Ellenborough, Justices Grose, Lawrence, and Le Blanc, (Lord Ellenborough having nonsuited the plaintiff,) on motion to set aside the nonsuit, held, that the plaintiff, the holder, was bound to present it at the bankers within banking hours. They must have considered it as part of the acceptance. If it was no part of the acceptor's contract, the holder could not have been bound so to present it; but, on the contrary, he should have applied to the acceptor himself for the money. The next case in order of time is *Lyon v. Sundius and Sheriff*‡. The acceptance was of a bill of exchange, as here; Lord Ellenborough, in that case, appears to me to use expressions not warranted by law. He says, "how can you make three words, "at Hankey & Co.'s," more than a memorandum? The answer appears to me to be, that they are more, for they are part of the acceptance. His Lordship then says, "the acceptor of a

* 2 H. Bl. 509.

† 7 East, 385.

‡ 1 Campb. 423.

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“ bill of exchange is liable universally;” the observation on this is, that he is so, if he accept generally, but not otherwise; for his obligation and the extent of it must depend on the acceptance itself. His Lordship then proceeds to say, “ this very point was brought before the Court some time ago, “ when the judges were all of opinion, that such words form no “ part of the contract, and did not require to be set out in the “ declaration.” If I thought this to have been an opinion deliberately formed by that excellent and able man, I should have hesitated before I declared myself persuaded that it is not tenable. It appears to me, that it cannot now be contended, that such words are no part of the contract of the acceptor. When his Lordship says, “ this point was brought before the “ Court some time ago,” I presume he means to refer to the case of *Smith v. De la Fontaine*, in Lord Mansfield’s time. That case was probably introductive of the confusion which has existed on this subject. The next case is *Ambrose v. Hopwood**, where the Court of Common Pleas held, that in an action on an acceptance, like that in the present case, the declaration must aver, that it was presented at the place where the person, by whom it was made payable, resided. In a subsequent case † in this House, it was holden to be sufficient to allege the bill to have been presented to the persons themselves. Still the case of *Ambrose v. Hopwood* shows it to have been the opinion of the Court of Common Pleas, that the declaration must aver a presentment consonant to the acceptance; and the acceptance throughout is treated as a substantial part of the contract. In *Callaghan v. Aylett* ‡, the acceptance was nearly like the acceptance in this case. The bill was there accepted payable at Messrs. Ramsbottoms, bankers, London. The declaration alleged an acceptance generally. At the trial it was objected, that this was a variance; and that there was no proof of a presentment at the place. A verdict was taken for the plaintiff, and these points were reserved for the opinion of the Court. On argument, the Court of Common Pleas held, that this was a qualified acceptance, to which the holder (he having acquiesced in it) was obliged to conform, and directed

* 2 Taunt. 61.

† 3 Taunt. 397.

‡ *Huffam v. Ellis*, 3 Taunt. 415.

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a nonsuit. Then follows in order of time the case of *Fenton v. Goundry* *. In that case the acceptance was in this form, "payable at C. Sikes, Snaith & Co." And the bill was addressed to the defendant at "No. 54, Lower Shadwell, Wapping." It seems, that, in this case, the idea of the expansion of the promise to pay first arose. One would think, there had been a precedent independent general engagement, and that something expansive was added to it. The acceptance is one act: to call it an expansion of the promise, is, in substance, to make it a general engagement, and pleadable as such. It is the promise itself. It is one entire engagement; and the legal effect of it is, "I accept or agree to this bill, but you must go first to Sikes, Snaith & Co. for the money." This makes it a qualified or conditional engagement. In that case a learned person, who argued for the defendant, says, "where something "is to be done by both parties at the same time, the defendant, "who is sued for a breach of his part of the engagement, must "show, that he did all that lay upon him to do, and that the "plaintiff did not perform his part, which prevented the defendant's performance †." I conceive the facts of that case do not warrant this observation; for the presentment is solely the act of the holder; and the payment is not to be made by the party himself, for no one expects to find the acceptor behind the banker's counter: therefore, there is nothing to be done by both parties at the same time; for the parties, from the nature of the engagement, are not to be present at the same time. This is an argument which probably had much weight; but I conceive that the foundation of it fails. In deciding the case, the Lord Chief Justice appears to have said ‡—"It has "become a frequent practice, in order to avoid the inconvenience to the holder of not having his bill honoured when he "calls for payment at the party's ordinary place of residence, "to intimate his other house of residence for the purpose, if I "may so express it, which is at his banker's, where he engages, "as it were, to be found at the usual hours of business." I am satisfied, that this observation is ill-founded. No one believes it to be the acceptor's place of residence, nor that he will be at all found there. The truth is, it is to avoid the inconvenience

* 13 East, 459.

† 13 East, 465.

‡ 13 East, 469.

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of keeping funds in his own house, that he makes the bill, by his acceptance, payable by or at his bankers, which is not his house of residence, nor considered as such, but where he has cash or credit. It cannot but be observed, too, that there was floating in his Lordship's mind, a notion that the obligation to pay by the acceptor was general and universal: this is true of a general acceptance; but if it be urged as applicable to a special, qualified, or conditional acceptance, I cannot agree to it: for though the party who calls for the acceptance may refuse to take it if it be not general, yet, if he do accept it, and assent to its being special, he must pursue his remedy according to the terms of the contract itself: for an acceptance is as much a contract, as is a policy of assurance or a charter-party. Both the other learned Judges, in that case, appear to speak with considerable doubt on the subject; the Court hinted at a further consideration of the question, for judgment *nisi* only was given; but, as the reporter says, no further notice was taken of it. After this case, in *Gummon v. Schmoll**, the Court of Common Pleas gave judgment on a question precisely similar to the present, on a full consideration of *Fenton v. Goundry*, and all the preceding decisions. That Court held, first, that the acceptance was a contract. Secondly, that the introduction in it of the words "payable at Batson's, London," qualified the contract; and that it was a condition precedent. Thirdly, that the holder must show, in pleading, that he has complied with it. One of the learned Judges†, who concurred in this opinion, observed, that the reasons given in *Fenton v. Goundry* show, that the Judges were very doubtful as to this point. The case of *Huffam v. Ellis* (which I have before alluded to) came before this House on error. The bill was accepted, payable at Kensington, Styan, and Adams'; and it was averred in a declaration by an indorsee against the drawer, that the bill was presented to the persons using the name, style, and firm of Kensington, Styan, and Adams. This House held, that this was a sufficient averment to satisfy the words "payable at Kensington, Styan, and Adams." The case of *Bowes v. Howe*‡, is a case of great weight. It was subsequent to all

* 5 Taunt. 344. S. C. 1 Marsh. 80.

† 5 Taunt. 30.

‡ Chambre, J.

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the cases on this subject, which have been brought before the courts, except *Gammon v. Schmoll*; and that was in the following year. *Bowes v. Howe* was an action by one, who held a promissory note by assignment or indorsement, against the makers. The note was made payable at Workington Bank. The declaration averred, that the plaintiffs in error (the makers of the note) became insolvent before the action, and wholly declined and refused to pay it at Workington Bank. The plaintiff below had judgment, which was reversed in the Exchequer Chamber. The Lord Chief Baron, Sir Archibald Macdonald, delivered the judgment of the Court. He held that the question was, whether the allegation in the declaration dispensed with the necessity of presenting the notes (for there were counts on many other notes) at Workington Bank? and that it was clear that a demand was necessary unless dispensed with; and that the allegation was not sufficient to enable the plaintiff below to maintain his action. The words "at Workington Bank," were in the body of the note; the words "payable at Sir John Perring & Co.'s" are, in the case before this House, in the body of the acceptance; and I am of opinion, that there is no solid distinction between that which is incorporated in a note, and that which is incorporated in an acceptance. It is proper to advert to the case of *Head v. Sewell**, which arose before Lord Chief Justice Gibbs at *nisi prius*. He held, in the case of such an acceptance as the present, that it was not necessary to prove a presentment at the place mentioned in the acceptance; and, following up the language of some of the cases, said, that the acceptor is generally and universally liable. It seems to me to be most strange, after the cases in his own Court, (one of which was not more than two years before) which were directly contrary to this opinion, that nothing further should have been done in this case of *Head v. Sewell*; that it should not have been brought before the Court. I am persuaded, that there must have been some circumstance in that case, which the reporter has not noticed. The case of *Richards v. Lord Mil-sington*†, need only be mentioned shortly. That was an action on a promissory note, before the same Chief Justice at *nisi prius*. His Lordship said, "the words 'payable at Bruce &

* Holt, N. P. C. 363.

† Id. 364, note.

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“ Co.’s” are not introduced in the body of the note, they are “ only inserted in the margin.” This case, therefore, has nothing to do with the subject. I have adverted to all the cases which appear to be applicable to the case before the House; and the result is, that I am of opinion, that the bill of exchange in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co.’s bankers, London, the holder was bound to present it at that house, and to aver in his declaration that the same was presented at that house for payment.

2d Question. As to the second question I am of opinion, that the acceptance is, in law, to be considered a qualified acceptance, that the bill shall be paid at the house of Sir John Perring & Co. bankers, London, and not as a general acceptance to pay the same, with an additional engagement or direction for the payment at that house. The acceptance is an entire contract; the holder, who receives it, must take it as it is, (if he does not dissent from it,) and it must be construed as it was meant, if the intention can be discovered, and the words are sufficient to effectuate it. I feel no doubt as to the intention, and can discover no legal ground to prevent its being carried into effect.

3d Question. As to the third question proposed by your Lordships, I am of opinion that this must be considered, first, as to the time, secondly, as to the place. And first, as to the time; if *B.* accept a bill drawn on him at three months, and, by his acceptance, make it payable at four months, and thereby lengthen the time of payment, I think *C.* could not maintain an action against *A.*, if this be done without his previous authority, or subsequent assent. And if it was accepted payable at a shorter time than three months, without such authority or assent, I think the law is the same; because the drawer might be liable to be called on sooner for the money than by the terms of his bill he had a right to expect. Secondly, as to the place; the question, as it appears to me, is, whether the variation is material? A general acceptance would have an implied relation to the drawee’s place of abode. If the drawee accept it payable at his bankers in the same place, I am of opinion, that would not be material, and that a drawee may, within the custom of merchants, well appoint another

place of payment, if no material inconvenience to the holder be thereby introduced.

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In answer to the fourth question, I am of opinion, that, in the case comprehended in this question, *C.* the payee, could not maintain an action against *A.* the drawer, without delivering, or offering to deliver, up the bill to him; for, whilst the bill remains in *C.*'s hands, the drawer's remedy is suspended; and, when the drawer has the bill returned, it will appear that the drawee has not complied with the requisition in it, and the drawer is restored to his original situation. I do not think, that the debt owing from *B.* to *A.* in any way varies the case, as between *A.* and *C.*, for *C.* receives the bill from *A.*; and, until *C.* has agreed to an acceptance materially different from the terms required by the bill, the transaction rests between *A.* the drawer, and *C.* the payee.

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HOLROYD, J.—As to the first question, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring & Co. bankers, London, (that is to say, at the house of certain persons using in trade and commerce, the names, style, and firm of Sir John Perring & Co. bankers, London,) the holder was not bound to present it at that house for payment, and to aver in the declaration that the same was presented at that house for payment.

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As, in my way of considering the subject, the second question appears to me to be involved in the first, I shall state my opinions on the second question, before I give my reasons for either.

On the second question, I am of opinion, that the said bill, having been so accepted as aforesaid, such acceptance is in law to be considered not as a qualified acceptance, to pay the same at the said house of Sir John Perring & Co. bankers, London; but as a general acceptance to pay the same, with an additional engagement or direction for the payment thereof at that house. Though the allegation in the declaration has not treated the acceptance simply as a general acceptance, but has stated the place of payment as a part of it; yet, as the allegation is, that the defendant accepted the bill *according to the usage and custom of merchants*, payable at Sir John Perring & Co.'s,

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bankers, London, the first question appears to me to involve in it that which is proposed to us as the second question, namely, what is the effect of such acceptance *according to the usage and custom of merchants*? in like manner as if the allegation had been simply that of a general acceptance, and as if the question had arisen at the trial on the proof of an acceptance made payable at the place.

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In considering the first question, therefore, which will also dispose of the second, I shall, in the first place, consider what is in law to be now deemed the effect of this acceptance, according to the usage and custom of merchants. If it be in law to be considered not as a qualified, but as a general acceptance, *according to the usage and custom of merchants*, with an additional engagement or direction for payment at the specified house, it will stand, then, in my opinion, as if a mere general acceptance were stated in the declaration; and in an action against the acceptor upon a mere general acceptance, although he may be ignorant in whose hands the bill is, and, consequently, know not to whom to go to pay it, yet the constant course of proceeding in such action has always been not to allege a presentment to the acceptor for payment, nor to prove it at the trial.

The history of the cases before that of *Callaghan v. Aylett*, and the grounds upon which those cases, as well as the case of *Fenton v. Goundry*, were decided, appear to me decisive upon the two questions. The doubts, which have arisen upon the effect of these acceptances, appear not to have been entertained until after that point had been decided as a point free from doubt, both by judges and jury, for a period of nearly twenty-six years; those decisions taking as their basis the generally received and known usage among merchants, as to the effect of these acceptances, both previous, and up to, and during all that period of time. The case of *Smith v. De la Fontaine*, according to the note which I have of the case, was decided in the year 1785, first upon a trial by jury before Lord Mansfield (to whom, Lord Ellenborough says, in *Fenton v. Goundry*, the law of bills of exchange was as familiar as to any judge who ever sat on the bench), and, afterwards, by the whole Court of King's Bench, who were so clearly of opinion, that the making of the acceptance to be payable at Messrs. Bid-

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dulph, Cox and Co.'s, was for the convenience of the acceptor, and that there was no colour for the objection, that it was a special acceptance, and that the plaintiff ought to have proved an application at that house for payment in that action, which was an action against the acceptor; that the Court refused even a rule *nisi* to set aside the verdict for the plaintiff and enter a nonsuit. This continued to be acted upon as the law from thence till the year 1808, when the same point was determined by Lord Ellenborough in *Lyon v. Sundius*, which was a similar action on a like acceptance; Lord Ellenborough considering the point as settled and without doubt, and that the additional words were nothing more than a mere memorandum, the acceptor being liable universally: and so this continued, with the exception of *Callaghan v. Aylett*, which I shall notice presently, till *Fenton v. Goundry*, in Easter term 1811, when, on a demurrer to a count like the present, the Court of King's Bench decided, that the acceptance was to be considered in law as a general acceptance, with a mere intimation for convenience of the place designed for payment. Lord Ellenborough proceeds to decide the case upon the generally received opinion of the commercial world, as a matter quite clear of doubt, and upon what he had always understood to be the practice and doctrine concerning bills of exchange, since he had been familiar with them. The other judges of the Court, with the exception of Mr. Justice Le Blanc, who was absent from indisposition, also coincided with Lord Ellenborough in deciding upon the generally received opinion and practice which had long before prevailed. When the usage and custom of merchants respecting bills of exchange has been inquired into and ascertained, such usage and custom becomes matter of law, to be taken notice of as such by the judges; which is the reason why, though such usage and custom used formerly to be alleged in pleading as a fact, such allegation has for a long time been wholly discontinued.

Two cases, besides that of *Callaghan v. Aylett*, had indeed intervened, but they were both of them against the drawer, and appear to me to be not material to the present questions. One of them, *Parker v. Gordon**, is in the King's Bench; the other, *Ambrose v. Hopwood*†, is in the Common Pleas.

* 7 East, 385.

† 2 Taunt. 61.

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The acceptances were similar to the present: the one was a determination, that, *in order to charge the drawer, a presentment at the place out of the usual banking-house hours was insufficient*: and the other, that a presentment to the bankers, without saying at that place, was insufficient for that purpose; and, in neither case, did there appear to have been any presentment to the acceptor himself, personally, at all.

The case above referred to, of *Callaghan v. Aylett**, was a case which was decided by the Court of Common Pleas, (Mansfield, C. J. being absent), in Hilary term 1811, so lately as the very term next before the decision in *Fenton v. Goundry*; but the cause had been tried before him, and a verdict had been given for the plaintiff, subject to the opinion of the Court as to the necessity of proving that the bill had been presented at the bankers for payment. As far as can be collected from both the reports of that case, the Court do not, on that occasion, appear to have had the case of *Smith v. De la Fontaine* laid before them; or to have considered, whether there was any known, established, declared, or generally received understanding or usage upon the subject among merchants. But they appear to have decided in that case entirely upon the dry construction and effect of the acceptance, as a mere engagement to pay the bill at a particular house named by the acceptor; treating it as a mere naked question of construction, arising from the words, independently of any inquiry as to the usage and custom among merchants respecting it. The case of *Gammon v. Schmoll* has, indeed, been since decided by the Court of Common Pleas, (Mansfield, C. J. being then also absent), in which that Court appear to have decided again, upon the mere construction of the words alone, that the acceptance contained a condition precedent.

2d Question. In now considering the question, whether the acceptance in the present case be a general or a qualified acceptance, it appears to me, that, upon a question of this nature, it is an important inquiry and consideration, whether there was any, and what, generally received, declared, or known usage and custom among merchants; more especially, if any such had been ratified and confirmed in judicature by judges and jurors; and that alone appears to me to be in itself decisive of the

* 2 Campb. 549; S. C. 3 Taunt. 397.

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question, both upon the law and justice of the case. The parties thereto must, I think, be taken, in an instrument of a peculiarly commercial nature, both to have given and received this acceptance, (and consequently to have meant and understood it), according to such generally received, known, and declared understanding, and usage, and custom. After the decision of *Smith v. De la Montaine*, both by the jury and the Court, especially when confirmed afterwards by *Lyon v. Sundius*, in the year 1808, it must, I think, be deemed, that there had been, upon the subject, both before, and up to, and during that period, and until the determination of *Callaghan v. Aylett*, a generally received and known opinion and usage, and custom among merchants, by which those acceptances were meant and taken as general acceptances, with a mere intimation of a place for payment; and not as qualified acceptances, which might be refused: an opinion, usage, and custom ratified and confirmed by those judicial determinations; and continually acted upon, both before and during that period, by the constant reception of all such acceptances, without any instance being brought forward of the refusal of any, as being a qualified acceptance. In a question, therefore, as to the effect of such an acceptance, (which is, really, only a question, what the parties meant and understood by the acceptance, which the one had given and the other had received,) it must, as it appears to me, be taken, that the one of them meant, and that the other understood him to mean, by the acceptance so given and received, nothing but what was the generally received understanding upon the subject, of persons most generally giving and receiving such mercantile instruments, namely, merchants; especially when that had been inquired into, ascertained, determined, declared, and confirmed by judicial decisions.

But even if this supposed generally received understanding, usage, and custom, is to be considered as unascertained and uncertain, and that the effect of this acceptance is, for its construction, to be taken from itself alone; still I cannot but think, that it is to be deemed only as a general acceptance to pay, with an additional engagement or direction for the payment at the specified house. In this view of the question, the legal principles and rules of construction, as well as the nature

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of an acceptance in itself, appear to me to be most material to be attended to.

Let us consider the nature of an acceptance in itself. The bill is brought merely for acceptance, that is to say, for a declared assent, that the acceptor will pay it according to the usage and custom of merchants. A mere declared assent by the drawee to pay, or any thing amounting thereto, is, in law, an acceptance. By the first word, "accepted," which is the thing which the very bringing of the bill requires the drawee to do, and which the drawer has a right to expect that the drawee will do, if he has effects in hand, which his acceptance of the bill implies:—I say, by the very first word, "accepted," the drawee has declared his assent to pay the bill; and, as I think, to pay it in such manner as the drawer has required, unless that which is added so qualifies this assent, as to be inconsistent with an assent to pay it as required. If it be not thus inconsistent upon the face of it, the holder is not to suppose that it was meant to do away or alter the effect of what the acceptor had before written and signified; and, if the acceptor did so mean, he should have so expressed himself, or should have stated, that he would not accept the bill as required, (that is, to pay it according to the usage and custom of merchants,) but that, though he would not so accept it, he would engage to pay it at such a particular place, if the holder would take that engagement.

The words of the acceptance are those of the drawee only, and not of the drawer or of the holder, and are to be taken, although according to the intent, yet where that is not sufficiently ascertained, most strongly against the person using those words. The maxim of law, *verba fortius accipiuntur contra proferentem*, and Lord Bacon's observations thereon, appear to me very applicable to this case, supposing this to be considered as a mere question of construction. He says that this rule "is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and, secondly, because it makes an end of many questions and doubts about the construction of words; for, if the labour were only to pick out the intention of the parties, every judge would

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have a several sense; whereas this rule doth give them a sway to take the law *more certainly* one way *." This rule, I think, requires the drawee, especially where it is to defeat in any degree the rightful expectations of the drawer, that the bill shall be unqualifiedly accepted as he has drawn it; and where the drawee has, in the first instance, declared his assent to pay it, if he meant to qualify or do it away, or alter it in the whole, or in part, or to clog that which is yet absolute, with any condition not beneficial either to the drawer or to the bill-holder, this rule, in my opinion, requires the drawee, in such case, to use, in addition, such words as clearly and unequivocally express or show such qualification, alteration, or condition. If the acceptance in question be considered as qualified, it must be by construing it, as if the drawee had inserted, what he has omitted, the word "only;" and what, if he so meant, the rules of construction, I think, require that he should have stated. The words "payable at Sir John Perring & Co.'s, bankers, "London," may mean, either that the bill *may* be paid there, or an intimation that it *will* be paid there, (that is, if the holder bring it there); or it may be intended as an obligation binding also upon the holder, that it *shall* be paid there, and there only. But if the writer had meant the last, I think that, in order to bind the holder to consider that he did so mean, he should so have expressed himself.

For these reasons, I am of opinion, that the acceptance in question, so as aforesaid alleged in the declaration, is to be considered, not as a qualified, but as a general acceptance to pay, with an additional engagement or direction for the payment thereof at the specified house; and, consequently, that the holder was not bound to present it at that house for payment, and to aver, in the declaration, that the same was presented at that house for payment.

But supposing that this acceptance be to be considered as a qualified acceptance to pay the bill at the specified house, still the first question proposed to us involves a further question; for it would not, in my opinion, from thence follow, that the holder was bound to present it at that house for payment, and aver in the declaration that it was so presented; for I still

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think, that the holder would not, even in that case, be by law bound so to present it, or so to aver in the declaration.

The acceptance, even taking it to be a qualified acceptance, is still, I think, an undertaking to pay the bill at a particular time and place, absolutely and at all events, and not subject to any *expressed* or implied condition, which must previously be performed by the holder. Upon a promise or undertaking, either to pay a bill of exchange or money, or to do any other particular act, whether at a particular time and place or not, the very non-feasance alone is a breach of the contract, and the promisee need do no more in support of his action for such breach than to prove the promise: the non-feasance being a negative, the feasance, or that which in law is an excuse for it, is matter purely of defence, and the *onus probandi* thereof lies upon the defendant. The person, therefore, so promising or undertaking, in order to defend himself, must either establish, that he has done the thing according to his engagement, or he must excuse his non-performance. It is not sufficient for a defendant, in his excuse, to say, that the plaintiff was not present at the time and place to demand and receive the money; but he must, in order to defend himself, allege and prove, that he did all in his power towards the performance, and that his not doing more was owing to the refusal or default of the plaintiff. He must establish either a tender and refusal, or that he, the defendant, was ready at the time and place to pay, but that the plaintiff did not come, nor was present to receive. The circumstances excusing the non-performance, and throwing the fault on the plaintiff, are matters in defence. This appears, I think, by Lord Hobart's opinion in *Baker v. Spain**, and by the resolution of the Court of Common Pleas, there cited, in *Bushby's* case, as to the payment of rent, which is payable on the land. So Littleton says†, “Also upon such case of feoffment in mortgage, a question hath been demanded, in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. ? And some have said upon the land so holden in mortgage, because the condition is depending upon the land. And they have said, that if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and

* Hob. 8.

† Litt. s. 340.

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“excused of the payment of the money; for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him, for he is bound to seek the feoffee if he be then in any other place within the realm of England.” The difference of opinion, there, was upon this point; viz. whether the mortgage-money was to be paid at a particular place, viz. upon the land, or not; but, in either case, whether it was to be there paid or not, the feoffor, who was to pay the money, was bound to do all in his power towards his performance, before he could be excused for his non-performance. *If no time be fixed* for the performance, then indeed the obligor, who is to pay the money at a particular place, is to do more (and this doctrine should be remembered when the case of *Sanderson v. Bowes* comes to be considered); he must, according to Co. Litt. *, “give the obligee notice, that, on such a day, at the place limited, he will pay the money, and then the obligee must attend there to receive it; for, if the obligor then and there tender the money, he shall save the penalty of the bond for ever.” Lord Coke then adds, “The same law it is, if a man make a feoffment in fee upon condition, if the feoffor, at any time during his life, pay to the feoffee 20 *l.* at such a place certain, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it; for without such notice as is aforesaid the tender will not be sufficient.” In both these cases, therefore, in order to save the bond or feoffment, the obligor and feoffor must attend and be ready with the money at the place, though the obligee or feoffee be absent; for the tender of which he there speaks is a tender (or rather what he calls a tender), though the obligee or feoffee be absent; for he is speaking of a tender, which would not be an excuse without such notice; which is, therefore, a tender by the one in the absence of the other; and he immediately adds, “but in both these cases, if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money.” The forms of declaring, not only upon awards, but upon other instruments for the non-payment of money at a particular place, are confirmatory of this doctrine. In Rastell’s Entries are three precedents; two in debt on bills obligatory for money to be paid at particular marts or fairs †, and the other for rent, payable at

* 211, a. † Ante, in the opinion of Richardson, J. pp. 427, 428.

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a particular place on particular feasts*. The declarations did not contain any allegation of presenting the bills for payment or any demand of the money at the marts, fairs, or place; but to one of those declarations, one upon some of the bills obligatory payable at different marts or fairs, the defendant pleaded that he was at the fairs ready to pay the plaintiff, if the plaintiff had been there, and would have delivered to him the bills aforesaid; and that neither the plaintiff, nor any for him, was then there to receive the same, with an allegation that he has been always since ready to pay, and a *proferit* of the money into court. A bill of exchange, in an action against the acceptor, stands, I think, upon the same footing as a bill obligatory, or any other engagement for the payment of money, so far as regards the necessity of alleging in the declaration, or of proving at the trial, a presentment of the bill, or a demand of the money. In an action against the acceptor, where he accepts generally, such allegation is never made, nor such proof required or given: though such a presentment is, no doubt, usually made *in fact* in such cases, before the action is brought, yet the nature of the instrument itself (*viz.* a bill of exchange) has not rendered such an allegation or proof necessary, except where the action is brought to charge the *drawer* or indorser. The nature of the instrument, therefore, cannot, as it seems to me, make such allegation or proof more necessary where the acceptor adds a place for payment, than in other cases where the obligor or promiser adds a place for payment.

In either case, such allegation or proof is, I think, not requisite on the part of the plaintiff; but, if the defendant, or his bankers, or any one for him, had his money ready at the time and place, and would have paid it if the bill had been then and there presented for payment, it is matter of defence, and may be pleaded by him; which removes, I think, the hardship and mischief which, it is supposed, may result from not requiring an allegation and proof of presentment for payment at the specified place to be made and given by the plaintiff. Independently of the question of general or qualified acceptance, Lord Ellenborough and my brother Bayley, in *Fenton v. Goundry*, both of them acceded to and confirmed this reasoning, as will be seen

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in 13 East *. Their opinions, in that case, upon this point, appear to me to be material in showing, that the case of *Sanderson v. Bowes*, which was determined by the same judges very shortly afterwards, was determined on grounds not at all inconsistent with their opinions in their decision in *Fenton v. Goundry*. My brother Bayley, too, upon another occasion, at Nisi Prius, in Hilary term, 1809, in *Wild v. Rennards* †, held the same doctrine, that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity of proving that it was presented there for payment; and, in Michaelmas term 1810, in *Nicholls v. Bowes* ‡, Lord Ellenborough held the same. But it is said that the decision in *Sanderson v. Bowes* §, in Michaelmas term 1811, by the Court of King's Bench, and the decision of *Bowes v. Howe* ||, in Trinity term 1813, by the Court of Exchequer chamber, which is founded thereon, are inconsistent with this doctrine. The above precedents in *Rastell* were not known, or, at least, not brought forward in either of those two cases; and, if those two cases were not distinguishable from the present, but were so much in point as, at first, they may appear, it might be for consideration whether those cases were not still open to a revision, like the decisions which for a time prevailed in favour of actions upon legacies, and of actions against femes covert with separate maintenances. But, when those two cases come to be looked at and considered, they are, it appears to me, very distinguishable from the present, and also from *Fenton v. Goundry*, on this very point. In the present case, and in *Fenton v. Goundry*, the instrument declared on, a bill of exchange, was payable at a certain time. In *Sanderson v. Bowes*, and in *Bowes v. Howe*, the instrument declared on (a promissory note) was not payable at a particular time, but generally, entirely at the pleasure of the holder of the note, and so Lord Ellenborough observes ¶, where he distinguishes *Sanderson v. Bowes* from cases where money was to be paid, or something to be done at a particular time, as well as place. The cases of *Sanderson v. Bowes*, and *Bowes v. Howe*, were both cases of promissory notes of the Workington bank, payable on

* 470 and 472.

† 1 Camp. 425. note.

‡ 2 Camp. 498.

§ 14 East, 500.

|| 5 Taunt. 30.

¶ 14 East, 504.

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demand to bearer at the Workington bank. The notes being made payable to bearer, not at any specific time, but merely *on his, the bearer's demand*, the promissors could not comply with the above-mentioned rule laid down in Co. Litt. *, of giving notice when they would pay the money at their bank, as they could not know who the bearer was *till* the money was *demanded*. Nor was it to be paid but *upon demand*, which might, therefore, be deemed a condition precedent, quite consistently with my reasoning, and also, with Lord Ellenborough's and my brother Bayley's, as applicable to cases where the money was to be paid at a time and place certain; and, if the demand thus became in those two cases a condition precedent, the place as well as time of the demand must necessarily form a part of that condition, and may require to be averred, as it was in those two cases decided.

For these reasons, therefore, I think, even if the acceptance, as stated in the first count, be to be considered as a qualified acceptance, that the holder was not, in the present case, bound to present it at the house for payment, or aver in the declaration that the same was so presented.

3d Question. In answer to the third question proposed by your Lordships, I think, that if *A.* draw a bill upon *B.* in favour of *C.* for 100*l.* and *C.* without the previous authority or subsequent assent of *A.* take an acceptance for the bill for the whole of the 100 *l.*, but an acceptance qualified as to the time or place of payment, *C.* could not maintain an action *upon the bill* against *A.*

In the case put by this question, the drawer has a right, I think, or at least may be considered as having reason to expect, either that his bill, if accepted, will be accepted to be paid in such manner as he has required, that is to say, according to the tenor and effect of the bill, and the usage and custom of merchants; or, that due notice will be given by the person taking the bill from him, according to such usage and custom, in case the bill be not so accepted. He *may* be injured, if the bill be not so accepted as he has required (*prima facie*, at least, *it is*, I think, to be so considered); and, in default of such acceptance, he has a right, I think, to due notice of such default, in order that he may take such steps as he may think proper to

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avert such possible injury. The holder may either receive or refuse a qualified acceptance. If he refuse, he must give due notice; and, if the bill be foreign one, he must also protest it, in order to charge the drawer. If he do not refuse, but do receive the qualified acceptance, in that case, by assenting to the qualifications imposed by the acceptor in varying the time and place, he becomes party to a fresh and different contract with the acceptor, to which the drawer was neither party nor privy: the contract is an entirely new one, assuming a new shape; the bill is converted into and becomes a different or new bill, having a different tenor and effect from the old one, viz. such as the qualifications of the acceptance, either as to time or place, have ingrafted into it. C. by taking a different security, viz. this qualified acceptance, instead of having the one which the drawer had a right, or had reason to expect, and which C. was to require should be given him, has, I think, no right to maintain an action against the drawer upon this bill, the nature and effect of which has been altered by his having taken this qualified acceptance of it. In *Boehm v. Garcias**, (sittings after Michaelmas term 1807,) it was held by Lord Ellenborough, that the drawee has no right to vary the acceptance from the terms of the bill, unless they be unequivocally and unambiguously the same; and, therefore, where an action was brought against the drawer on a bill drawn at Lisbon, payable in *effective*, and not in *Vals reals*, where the drawees offered to accept it, payable in *Vals denaros*, (another sort of currency, which was refused,) Lord Ellenborough held, that the plaintiff had a right to refuse this acceptance, though the defendant proposed to show, that *Vals denaros* were sufficient to answer what was meant by *effective*; and wherever the holder may refuse the acceptance by reason of its being qualified, (as he may, I think, wherever the same is qualified, either as to time or place,) he cannot, I think, if he take the acceptance, sue the drawer upon the bill.

In answer to the fourth question proposed by your Lordships, I think, that if A. was debtor to C. in 100 *l.* previous to his so drawing upon B. in favour of C. to the amount of 100 *l.*, C. could, upon A.'s refusing his assent to an acceptance, qualified as mentioned in the third question, maintain an action upon the

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* 1 Canpb. 425, note.

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the original debt against *A.* without delivering to *A.* the bill so accepted; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.*

The bill itself, having been dishonoured, has become no satisfaction for the original debt; the right of action upon the original debt, therefore, remains: and though, if *A.* pay or tender to *C.* the original debt, with the expenses, &c. incurred upon the dishonoured bill, he will be entitled to have that bill delivered up again to him; yet, until *A.* has so done, the right to the bill, as it appears to me, which was given by him to *C.* as a security for, or in order to discharge that debt, remains in *C.* who may, I think, bring an action, either upon the original debt, or upon the bill; or may bring an action, including both those causes of action, in case they be of such a nature as to be capable of being joined together in one action. The original debt is not extinguished, but the right of action upon it remains, or is revived by reason of the dishonour of the bill; and *C.* I think, has a right to retain the bill, which was given to him as a security, or for the discharge of his debt, and to use it either as a ground of action in itself, or as a medium of proof for establishing his original debt: and the circumstance of *B.*'s being also indebted to *A.* in a like sum of 100*l.* appears to me to make no difference as to *C.*'s rights of action; for *A.* only by doing what by law he is bound to do, (namely, by payment of his debt, &c. to *C.*) may entitle himself to the possession of the bill, and thereby avoid any injury, which he may, otherwise, sustain by the want of it in seeking his remedy against *B.* for the recovery of that debt.

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PARK, J. With respect to the first question, as the bill of exchange is alleged to have been accepted according to the usage and custom of merchants, payable at a particular banker's in London, I am of opinion that the holder was bound to present it at that house for payment; and to aver in his declaration that the same was presented at that house for payment.

* To come to that conclusion, it appears to me to be only necessary to consider who the parties to the contract are; and what contract the defendant on this record has entered into. The plaintiff, or the payee, it is true, originally took a bill drawn upon the defendant generally: but when the defendant had that bill presented to him for acceptance, he said by his

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acceptance, I do not choose to enter into this general engagement, for my avocations may, at the time when the bill shall become due, call upon me to be in some distant part of the kingdom; and, therefore, both for your convenience and mine, I will specially accept it, payable at a particular banker's, or where my strong box or money is; and there you shall go for your money, and not follow and arrest me at a place where I have none: this is the defendant's contract. I admit that the holder might refuse to take such an acceptance; but, having taken it, can he enforce the contract against the contractor, without showing that the contractor has not complied with his own conditional acceptance? May not the acceptor justly say, if the holder should attempt to enforce it contrary to the acceptor's engagement, *non hæc in fœdera veni*? I think he may; for, that the acceptor has a right to make a special acceptance, differing from that which the drawer had wished to impose upon him, as to time, place, or amount, is admitted by those who argue for the defendant in error. This has ever been considered as law from the time of Marius, who wrote in the sixteenth century on bills of exchange*. The law upon these points, both as to the right of the drawee to make a special acceptance, and, as to the right of the holder to refuse it, is well stated; as your Lordships will find it, in *Petit v. Benson* †, If, then, the drawee may refuse to enter into any other than a special acceptance, when he has made it, and it is received by the holder, surely, it becomes as much the original contract of the acceptor as if he had written a promise to pay on certain conditions; or had promised to pay at a certain banker's, and no where else. The true sense of the case seems to be, and the principle is, that, whenever the place, at which the contractor is to perform it, forms a part of his express contract, and the duty is not merely collateral to it, it is necessary both to aver and prove a failure on that precise point on the part of the defendant. Thus, in 1 Rolle's Abridgment ‡, it is said, "If a place of payment is limited by the condition, the party is not bound to pay in any other place." Here, the duty is created by the instrument itself, with certain limits and qualifications.

* Mar. p. 17. 4th ed.

† Comb. 452.

‡ Tit. Condition, p. 444. l. 7. and p. 445. l. 52.

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No duty to be perfected by the acceptor arose anterior to the very instrument itself; and the acceptor can only be answerable to the extent of his engagement, by his qualified acceptance.

If we were to speak of the convenience of this or that practice, there can be no question that it would be most convenient that the presentment of the bill at the place where it is made payable should be deemed a condition precedent; for it would be very inconvenient that acceptors, such as the original defendant, should be made liable to answer every where, when it is notorious that they have made provision at a particular place, where alone they engage to pay. There is no antecedent duty as against the defendant, save that arising on the bill; and, therefore, the instrument or bill must be looked at for the purpose of seeing what the duty is.

This case has not been fitly compared to the case of bonds; for there the penalty creates the debt, and the party is liable upon it, but is to discharge himself from the penalty by bringing himself within the terms of the condition: that, therefore, must be matter of defence. But where a suit is in *assumpsit* upon a contract, the plaintiff must show that he has done every thing which lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now here, by the terms of this acceptance, a promise is made by the acceptor to pay at Perring & Co.'s; the plaintiff, who sues, then must bring himself within those terms, by showing that he made a demand at the place where the defendant said he would pay; and he cannot be made liable beyond the extent of his contract. Where a defendant contracts generally to pay a sum of money, he is liable to a creditor every where; but, where a person binds himself to pay at a particular place, he is not liable at any other place, till default be made at the particular place. For, otherwise, suppose a bill drawn upon one just before going the circuit (and this case is put by one of the most learned judges who ever adorned the Court of Common Pleas, I mean Mr. Justice Chambre *), which will fall due during the absence of such drawee; such a person living in chambers leaves no servant on his departure, excepting, perhaps, a laundress; what can be done in such a case, except to deposit the money with

* In Gammon v. Schmoll, 5 Taunt. 350.

a banker, and make the bill payable at that banker's? Otherwise such person would be liable to be arrested at any place in the course of his journey, where he might have no money, which, indeed, he would be the less likely to have after making provision at his banker's. I agree with that learned judge, that it is a great convenience to the public to maintain these special acceptances.

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But, it is said at the bar, if you can show that you had your money at your banker's, you would have a complete defence. Is it, then, no vexation to be causelessly arrested? Is a lawsuit no vexation? Is it nothing to be 20 l. or 30 l. out of pocket, though you gain your cause? And this evil is only met by the trifling inconvenience of an obligation on the plaintiff to call a witness to prove a presentment. Indeed, if we speak of inconvenience, it is all the other way; for, instead of the trifling inconvenience arising to a holder from the necessity of calling one witness to prove a presentment, every banker must, if the other view of the case be adopted, keep a number of clerks to go daily to all parts of the town, for the purpose of receiving payment of bills. So greatly was this inconvenience felt, that the Bank of England will not discount any bill that is not payable at a banker's.

But we have been told at the bar that the weight of authority is against the plaintiff in error. Let us examine the cases, and see whether the decisions in the Court of King's Bench, and one or two at *nisi prius*, before Lord Chief Justice Gibbs, carry with them the same weight of reason as those decided by the Court of Common Pleas sitting in bank; or, whether the Court of King's Bench has, in this respect, been consistent with itself.

The first case is *Smith v. De la Fontaine*, of which there is a short note in my brother Bayley's *Treatise on Bills of Exchange**: however, a more full account is given of it in a note to Mr. Holt's *nisi prius* cases†, which is taken from a manuscript of my brother Holroyd; and there seems no doubt, that in 1785 Lord Mansfield at *nisi prius*, and the Court of King's Bench afterwards, decided, that words similar to those here used were not words restricting or qualifying the acceptor's

* p. 129, note b. 3d ed.

† p. 366.

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liability, but rendering him liable generally; and that it was not necessary to prove a demand at the particular place in an action against the acceptor. But how has this been followed up? *Lyon v. Sundius* * is a mere *nisi prius* opinion, before the decisions of either *Callaghan v. Aylett*, or *Fenton v. Goundry*. Then came the case of *Fenton v. Goundry* †, in which the Court undoubtedly held that doctrine which is now under discussion; and which treated an acceptance like the present not as a conditional acceptance, but as a mere expansion of the promise to pay. But how is that consistent with the doctrine laid down in *Parker v. Gordon* ‡, by two of the Judges §, who were parties to the decision of *Fenton v. Goundry*? *Parker v. Gordon* was an action against the drawer; and I, therefore, do not quote the case as an authority, except to show that such words as these were considered as a special acceptance. "If a party" (says Lord Ellenborough in the last-mentioned case) choose to "take an acceptance at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly." And, in *Elford v. Teed* ||, his Lordship says that the case of *Parker v. Gordon* was conformable with the doctrine which he had usually held. Lawrence, J. says, in *Parker v. Gordon*, "The party might have refused to take the *special acceptance*; but if he choose to take the acceptance in that manner, *payable at the banker's*, does he not agree to take it payable at the usual banking hours?" And Le Blanc, J. says, in the same case, "If a party will take an acceptance, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue."

Two very modern cases have been quoted to your Lordships to show that Lord Chief Justice Gibbs concurred with the decision of the Court of King's Bench in *Fenton v. Goundry*; namely, the cases of *Head v. Sewell*, and *Richards v. Lord Milsington* ¶. I will speak of *Head v. Sewell* first. It is sufficient to observe, that it was only a *nisi prius* case: next, it is so singular a case, that either the note is incorrect, or the

* 1 Cambp. 422.

† 13 East.

‡ 7 East, 385.

§ Lord Ellenborough, C. J. & Grose, J.

|| 1 M. & S. 28.

¶ Holt, N. P. C. 363.

opinion of the Lord Chief Justice is not delivered with that very learned person's usual accuracy and precision. For, in the year 1816, he begins his observations by saying, that after thirty-five years experience he had never known the objection to prevail, and therefore could not admit the necessity of the proof. What? had he not known of the case of *Callaghan v. Aylett*, decided in 1811, five years before, in the Common Pleas, by Mr. Justice Heath, Mr. Justice Lawrence, and Mr. Justice Chambre, as eminent persons as ever sat on that bench; and which case, in consequence of its having been much opposed the following term in *Fenton v. Goundry*, made them the common talk in Westminster Hall? Had he not heard of the case of *Gammon v. Schmoll*, then quoted to him, and decided two years before, in the very same Court by his then colleagues, Mr. Justice Heath, Mr. Justice Chambre, and the very learned person who afterwards succeeded him in the Chief Justiceship, in both of which cases the objection prevailed? And then again, though his Lordship is stated to have said, that he never knew the objection prevail, he concludes by saying he knows there are conflicting cases. The other case of *Richards v. Lord Milington* he decides that he may preserve his own consistency in a former case of *Price v. Mitchell**: but, upon looking at that case, it will be found a mere memorandum at the foot of a note, which never was held to be a condition, but a mere memorandum or direction. I, therefore, do not consider these cases as adding much weight to the authority of the King's Bench.

But I find the King's Bench, in *Sanderson v. Bowes*†, which was confirmed by an unanimous judgment in the Exchequer chamber‡, deciding diametrically opposite to the case of *Fenton v. Goundry*: and every word of the judgment of that great and eminent judge Lord Ellenborough is, in my mind, conclusive in favour of the plaintiff in error. Agreeing, as I do, with the learned editor of the Treatise on Bills of Exchange§, that it is difficult to reconcile in principle with the case of *Sanderson v. Bowes*, that of *Fenton v. Goundry*; and *Sanderson v. Bowes*, being the last in decision, ratified by the decision of the twelve Judges of England, and most agreeable to good sense, reason, and convenience, I think that it ought to prevail. The only

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* 4 Camp. 200.

† Bowes v. Howe, 5 Taunt. 30.

‡ 14 East, 500.

§ Bayley on Bills, 185, note 1. 3d ed.

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difference between *Sanderson v. Bowes*, and this case is, that *Sanderson v. Bowes* was an action against the maker of a promissory note; this case is against the acceptor of a bill of exchange; but I need not inform your Lordships, that the Courts in Westminster Hall have long thought the analogy between notes and bills so strong, that the rules established as to one ought also to prevail as to the other; *Heylyn v. Adamson**, *Brown v. Harruden*†, fully prove this position. Then let us read the case of *Sanderson v. Bowes*; and if “bill” be read for “note,” is not every word of Lord Ellenborough’s luminous reasoning decisive of the present question? In that case the Court of King’s Bench held presentment at the banking-house necessary. *Bowes v. Howe*‡ contains the affirmance of this proposition, though there was a reversal upon another point in that particular cause. And, in conformity to that opinion, Lord Ellenborough, in a subsequent case of *Roche v. Campbell*§, held, that it was a fatal variance in a declaration not to state that the note was payable at a particular place where the note was so payable. And his Lordship’s language is peculiarly emphatical and applicable to this case; for he says, “This declaration represents the promissory note as containing an absolute and unqualified promise to pay the money. But, by the instrument produced, the maker only promises to pay upon the specific condition that the payment is demanded at a particular place. We have lately held (alluding to *Sanderson v. Bowes*) that where the place of the payment is mentioned in the body of the note it forms a material part of the instrument.” So, here, the acceptor only undertakes to pay upon the specific condition that the payment is demanded at a particular place: this, and no other, is the contract of the acceptor.

Having thus shown the inconsistency of these decisions, and that *Sanderson v. Bowes* has not only had the judgment of the King’s Bench in favour of that opinion, which I presume to deliver, but the confirmation, as to this point, of the whole Exchequer Chamber, can I hesitate in saying, that the strong current of authority is in favour of the plaintiff in error, when I add, the authority of Judges Heath, Lawrence, and Chambre,

* 2 Burr. 669.
† T. R. 148.

‡ 5 Taunt. 30.
§ 3 Camp. 247.

in *Callaghan v. Aylett*, declaring that, doubtless, there may be a qualified acceptance of a bill which a holder is not bound to receive, but, that if he acquiesce in it, he must conform to the terms of the acceptance; and the further authority of Judges Heath, Chambre, and Dallas, in *Gammon v. Schmoll*. Mr. Justice Heath*, treats it as a condition precedent, which must be shown to be performed. The reasoning of Mr. Justice Chambre does not seem to have been sufficiently adverted to; and nobody will deny his ability as a lawyer, and his great skill as a pleader. That learned Judge says, "I think the case is clear, upon rules of plain common sense and understanding, without going into all the cases. A man is not bound to receive a limited and qualified acceptance; he may refuse it, and resort to the drawer; but, if he do receive it, he must conform to the terms of it."—"What is the meaning of these words, *accepted, payable at*? They have a meaning: they impose a condition; and the person receiving such an acceptance must comply with the condition, and in pleading must show his compliance. It would greatly circumscribe the negotiation of bills of exchange if this were not so; for they would, instead of being of general accommodation, be restrained in their use to such persons in trade as have a fixed place of business." I have already endeavoured to show your Lordships that the inconvenience to holders of bills and to bankers would become ruinous by the number of clerks which they must employ, if such an acceptance is to be held to make the acceptor universally liable.

On these authorities, and upon the principles of common sense and understanding, I am of opinion, on the first question, that the holder was bound to present this bill at Sir John Perring's house for payment, and to aver that it was so presented.

As to the second question, *viz.* whether such an acceptance is to be considered in law as a qualified acceptance, I answer, that the whole of my reasoning, with which I have troubled your Lordships, is founded upon the affirmative of that proposition. All the text writers upon bills of exchange are clear on this point. I take it, that any acceptance varying from

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* In *Gammon v. Schmoll*, 5 Taunt. 353.

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the absolute tenor of that which the drawer expected by the language which he used in drawing the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance, which the holder is not bound to receive: but, if he do, the acceptor is liable for no more than he has undertaken. This doctrine of qualified acceptance, as to *part* of the money, is spoken of in Marius*, and in Molloy†. So, in the latter book, a partial acceptance as to time is mentioned‡. This is confirmed in Beawes's *Lex Mercatoria*§, and by Mr. Justice Bayley ||. It was treated as a qualified acceptance in *Sanderson v. Bowes*; and by Mr. Justice Lawrence, in *Parker v. Gordon*; and again in *Callaghan v. Aylett*, and *Gammon v. Schmoll*, in the Common Pleas; I therefore feel no difficulty in stating to your Lordships, that I conceive this to be a conditional acceptance.

3d Question. The third question, in my view of the case, is not of difficult solution. Marius supposes ¶, that if the holder take from the acceptor an acceptance, even for a *part* only of the money drawn for, he may do so, provided he protests and gives notice to the drawer, and the bill is not thereby void; nor, according to what he says in page 21, does it prevent the holder from having recourse against the drawer. This is stated in the case of so *material* a change as a defalcation of part of the sum drawn for. But to the case put by your Lordships, I answer, that, if the qualification, either as to time or place, works neither injury nor inconvenience to the drawer, the holder is not prevented (in case of non-payment) from his remedy against the drawer, because he has taken such qualified acceptance. In the case out of which this question arises it neither produces the one nor the other: but it is a custom productive of great convenience to every one concerned in trade, and without which qualification bills of exchange are not discountable.

4th Question. As to the fourth question, I am of opinion, that C. could not maintain his action for the original debt against A. the drawer, without delivering up to him the bill so accepted. Because, having once accepted such bill in lieu of and in satisfaction of his debt, he cannot recover for the original debt without relin-

* pp. 17, 21.

† b. 2. ch. 10. s. 21.

‡ Id. s. 28.

§ p. 481. 4th ed. fol.

|| Bayley on Bills, pp. 85, 86. 3d ed.

¶ p. 17.

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quishing the supposed security ; which, being an acceptance by B, (whom the question supposes to be indebted to the drawer,) will amount, at all events, to an acknowledgment of the debt. For, although it is not always true that the drawee is a debtor of the drawer, yet, perhaps, when the drawee accepts, it is *prima facie* evidence of a debt. The case of *Kearslake v. Morgan**, where it was held, that to an action for goods sold and delivered, it was a good plea to say that the defendant had indorsed to the plaintiff a promissory note, payable to him, the defendant, "for and on account of" the said debt, is not inapplicable to this question, to show that C. could not maintain an action for his original debt while he held in his hands a bill given to him by the defendant to that amount. I, therefore, answer to the fourth question, in the negative.

BAYLEY, J. In answer to the first question, I submit that the effect of such an acceptance is this, that to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir John Perring & Co.'s for payment, and to aver in his declaration, that the same was so presented ; but that, as against the acceptor himself, the holder is not bound so to present it ; that he is under no obligation to aver any such presentment in his declaration ; and that the only consequence of his neglect to present is this, that the acceptor may set up any loss he has sustained thereby as matter of defence. This question is raised upon a demurrer to the plaintiff's declaration. The point, therefore, is not whether a neglect to present may not, even as against an acceptor, in some cases, constitute a defence, but whether the presentment is or is not an essential part of the plaintiff's title. A presentment is a demand at the place of payment, and to determine this point, the rules which the law has laid down as to cases in which a demand is or is not necessary, must be considered. One of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous demand ; and that a tender or readiness to pay must come by way of defence from the defendant ; but that if he engage to pay upon demand what was not his debt, what he is

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payment due from a tenant still remained a rent, though made payable at the Royal Exchange in London. The propriety of what is said in *Plowden*, in case it had been a sum in gross, is not questioned. The inference, then, to be fairly drawn from the case in *Plowden*, corrected as it is by the case in *Croke Elizabeth*, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place, and offer it; but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself, (which, as being due, ought to be paid) but against damages.

In Brooke's Abridgment * is this position:—"In debt for rent, tender on the land and refusal of plaintiff is no plea, for he shall answer to the *debet*; but the contrary in avowry; for there is to be a return, and there ought not to have been distress if tender was made." Now what is the meaning of this passage? evidently this, that in debt it is no plea in bar of the action; it is a bar of damages only, not of the debt: and, therefore, he must answer to the *debet* by bringing the money into the court upon the tender, which in the case of a plea in bar to an avowry he need not do. *Brownlow v. Hewley* † is an authority to show that, upon a plea of tender on the land at the day in an action of debt, the rent must be brought into court; and *Horne v. Lewin* ‡ to show, that upon a plea in bar to an avowry it need not be brought into court. In *Osborn v. Beversham* §, in debt for rent, the plea was readiness at time and place, and ever since, and profert of the money. To this plea there was a demurrer, grounded on two objections. 1st, *Non obtulit*, for when time and place are certain, *semper paratus* without an *obtulit* is no plea. 2d, It is pleaded in bar generally; it should have been in bar of damages only; and the Court thought both objections good. *Levinz* makes a query on the first ground, because the rent is demandable, (*i. e.* Plaintiff should have demanded it,) "otherwise," says he, "of a sum in gross, which is payable without demand." In *Crouch v. Fastolfe* || cited yesterday, by my brother Richardson, to debt

* Dette, pl. 216.

§ 1 Vent. 322. 3 Keb. 800. 2 Lev.

† 1 Lord Raym. 82.

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‡ Id. 639. Salk. 583.

|| S. T. Raym. 418.

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for rent, there was a plea of attendance at the day and place; that the defendant was ready to pay; and that no one came to receive. To this plea there was a demurrer, because tender was not alleged; but it was resolved to be well enough, and adjudged for the defendant. A precedent of such a plea is in Thompson's Entries*; however, in *Horne v. Lewin*† a *paratus* without an *oblitis* was held insufficient. It is immaterial to the point which I am considering, whether there ought to be a tender or not, and quite sufficient for my view of the subject, if with a tender it would be a bar of damages. Now what are the legal conclusions which I draw, and the legal positions which I consider as resulting from the authorities with which I have troubled your Lordships? They are these, that, if a man, in respect of any debt which he owes, engage to pay it upon demand, or engage to pay at a given time and place, it is not a necessary part of the plaintiff's title to make such demand, or attend at such time and place; that he is not bound in his declaration to state any such demand or attendance; that a neglect to demand or attend will not bar his right to the debt, and enable the defendant to keep it; but that the defendant may show readiness on his part to exonerate himself from any damages.

I now come to apply these principles to bills of exchange. The acceptor is, by the law and custom of merchants, considered as the principal debtor; the drawer and indorser as sureties only, liable on his default, and not otherwise. His engagement is general, that he will pay; that of the drawer and indorsers is conditional, namely, that if due diligence be used, they will pay, if the acceptor does not. The engagement of the acceptor is, either that he has effects in hand, or that he is secure of having them by the time the bill becomes due. In the language of the Lord Chief Justice Eyre, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports that the acceptor is a debtor to the drawer, or at least has effects of the drawer's in his hands." The acceptor, therefore, has, or ought to have, in his hands, or under his control, the fund by which payment ought to be

* Lib. Placit. 150.

† Lord Raym. 644.

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made ; and it is his duty so to apply it. The drawer or indorsers have no control over the fund, and consequently no duty with respect to it. This difference of situation and character between the drawer and indorsers and acceptors, has produced a settled distinction in the manner of suing them. The action against drawer and indorser invariably shows that due diligence has been used ; the action against the acceptor invariably omits it. In an action against the drawer and indorsers the declaration invariably avers presentment of the bill, its dishonour, and notice thereof to the defendant. In an action against the acceptor no such averments are made. Every bill is to be properly presented for payment ; and in an action thereon against the drawer or indorser, a presentment according to the usage and custom of merchant must be averred and proved. In an action thereon against the acceptor, presentment (generally speaking) need not be averred or proved. This is clear, settled, undisputed law. Not that in practice such presentment is likely to be omitted : the risk of losing the responsibility of the drawer and indorsers generally secures it : but if there were to be an omission, that is no reason why the acceptor, who has, or ought to have, funds to discharge it, should keep those funds to himself, or should refuse so to apply them.

If a bill be addressed to *A.* in Bedford-square, and he accept it generally, in an action against the drawer or indorser presentment must be alleged and proved : in an action against *A.* presentment need not be alleged or proved. If *A.* have changed his residence, and accepted it payable at his new abode, does this make any difference ?—presentment need not be averred in the one case—need it be averred in the other ? If the necessity exist, there must be some reason for it. What is that reason ? Though I am putting the case where the bill is still payable at the party's own house, and this is the case where the bill is made payable at a banker's, does this make any difference ; does it vary the character or situation of the acceptor, so as to put him in the situation of a surety only instead of a principal, and if due diligence be not used, exonerate him from all liability, and enable him to keep the money to himself ? The form of the acceptance in this case is material. The declaration states it thus : “ Which bill of ex-

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change, he the said Joshua accepted, according to the said usage and custom of merchants, payable at Sir John Perring & Co.'s, bankers, London; that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring & Co., bankers, London." By whom the bill is to be paid at Sir John Perring & Co.'s, whether by the defendant, or by Sir John Perring & Co., the acceptance does not state; whether Sir John Perring & Co. were bankers for the defendant is not stated. In the first place, it is not in a form to require Sir John Perring & Co. to pledge their credit for the payment of the bill; it is at most only an authority to them to pay; and, unless Sir John Perring & Co. choose to make themselves responsible, they can never be sued for the money. Why it is to be paid there; whether, because Sir John Perring & Co. were the defendant's bankers, or because he was an inmate or member of that house, is not stated. I will take it, however, for granted, for the sake of argument, that it is made payable there, because Sir John Perring & Co. were the defendant's bankers. Sir John Perring & Co. then, are to be agents for the defendants in this transaction. Will making the bill payable at an agent's change the situation of the acceptor, and make it incumbent on the holder, in an action against the acceptor, to aver and prove presentment at such agent's, when they would not be bound to aver or prove presentment at the acceptors? That such presentment will generally be made there can be no doubt, because, otherwise, the security of the drawer and indorsers will be lost; but though presentment is in fact made, there may be cases in which the party may fail in proving it. The party presenting the bill may remove out of the reach of the holder, or may die. Is it right, or is it law, that because the holder fails in that link of evidence he is to lose his debt? Before the necessity of such averment is established I wish to draw your Lordships attention to the consequence. If the effect of such an acceptance be to make this averment and proof essential, it follows, that the holder has a right to object to this burthen, and reject the acceptance. Right to reject is admitted in *Bishop v. Chitty*, *Callaghan v. Aylett*, and in *Gammon v. Schmoll* *. Will this

* Per Chambre and Dallas, Js.

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produce no confusion in the course of trade, when this mode of acceptance prevails to such an extent as it does? The bill is generally left for acceptance at the house of the drawee by a clerk, and called for on the next morning. Suppose a party leaves a bill drawn on the drawee generally, at the house of the drawee, and that on calling for it he finds it accepted, payable at a banker's; if this mode of acceptance cast an additional burthen on him, he may take away the bill, strike out the acceptance, treat it as dishonoured, protest it, if it be a foreign bill, and at once commence actions upon it against all the parties. It may be said that this has never yet been done, and that the apprehension is chimerical. But why has it not been done? Because it has been, for a series of years, the rooted understanding in commerce, that an acceptance at a banker's throws no additional burthen upon the holder; but that it is merely an intimation that there the acceptor would be ready to pay it: once establish, that such an acceptance is conditional, and that the burthen of proving presentment at the banker's is thrown on the holder, and from that moment every such acceptance must be rejected. What will the drawer and indorser say? They will say, "If you take such an acceptance you do it at your peril; and we are discharged." The acceptor has no right by the acceptance which he takes to cast a burthen upon them. They are entitled to expect that if any acceptance is taken, it shall be such an acceptance as does not make such additional averment and proof essential. Taking such an acceptance, then, if it has the effect contended for, would discharge them, unless they had immediate notice of such acceptance, and assented thereto. It may be said, that notice then may be given to them; but will your Lordships come to a decision which imposes on the holder the necessity of giving notice to all the parties to the bill? If I were to state, that there are daily in London one hundred such acceptances given, I should speak far within the truth. If these acceptances be conditional, notice ought to be daily sent by the post to the drawer and indorsers of each bill, not that the bill is dishonoured, but that it is accepted payable at a banker's. The fact that no such notice is given, notwithstanding the prevalence of such acceptances, and the perfect acquiescence therein, shows stronger even than positive authorities what

has been the understanding, usage, and custom of the mercantile world concerning them; and, bills of exchange being mercantile instruments in daily occurrence, if they have received a mercantile construction, the construction put on them by the mercantile world ought to be their construction in a court of law.

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I have troubled your Lordships so much at length on the principles which, in my view, govern this case, that I shall address the house but shortly on the decisions. The point came first before the Court (as far as we can learn from printed reports) in *Smith v. De la Fontaine*: that case was tried before Lord Mansfield, in 1785, and from that time to the year 1806 the question does not appear to have been agitated. Then came *Callaghan v. Aylett*, in 1811, in which the decision was adverse to that of *Smith v. De la Fontaine*. The case of *Callaghan v. Aylett* was in the same year followed by that of *Fenton v. Goundry*; and I will only excuse the Court of King's Bench for coming to a decision on that case, (adverse as it was to the decision in *Callaghan v. Aylett*) at the moment, because Lord Ellenborough (and that learned person, while at the bar, had most extensive experience in cases of bills of exchange) laid the foundation of his judgment in *Fenton v. Goundry* on the invariable usage, to which he adverted in energetic language: on that ground only the Court of King's Bench did not take time to consider in that case.

The case of *Fenton v. Goundry* was followed by that of *Gammon v. Schmoll*, which I will only notice on account of the case of inconvenience there put by Chambre, J., and to the case put by him I will add one or two other supposed cases. A bill is brought to me for acceptance just as I am setting off for the circuit; I tell the holder that I am going to be absent from town, and that I can only accept the bill payable at my bankers: he refuses this acceptance, on the ground that it will give him additional trouble and inconvenience; and the bill is consequently dishonoured. Suppose the case of a bill drawn in the West Indies, on a merchant in England, who accepts it payable at a banker's: the merchant finding the bill not debited to him, supposes there may have been some neglect on the part of the holder, but finds the bill protested for non-acceptance; that the person who presented it for accept-

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ance was a notary; that the acceptance has been struck out, and the bill returned to the drawer in the West Indies; and that the holder has recovered 20 per cent., or whatever difference may have been occasioned by the existing rate of exchange beyond the nominal amount of the bill.

Many of the principles now insisted on may seem at variance, I admit, with the decision in *Sanderson v. Bowes*, and the other cases on promissory notes. I could distinguish those cases from *Fenton v. Goundry*; for in the latter case, the acceptance payable at the place was no part of the original confirmation of the bill itself; but, in the former cases, the words restrictive of the payment were incorporated in the original form of the instrument. But I do not wish to answer those cases on these grounds; for I am free to confess that I doubt the propriety of those decisions, although I was myself a party to them; and I think it more manly to say, that I consider my opinions in those cases erroneously formed, than to attempt to distinguish those cases from *Fenton v. Goundry*, by the use of nice and subtle differences. I hope, therefore, that the case of *Sanderson v. Bowes* will not be followed as a precedent; for, as far as I can judge, the principles for which I have been contending apply to promissory notes as well as bills of exchange. The case of *Bishop v. Chitty**, proceeded partly, and I think, principally, on the ground that there was actual *laches* on the part of the holder, and *laches* which prejudiced the acceptor. In that case, the acceptance was, "Messrs. Caswell and Mount, pay this bill when due, for Thomas Chitty;" it was, therefore, in a form entitling the holder to call upon Caswell and Mount to pledge their responsibility for the payment of the bill. In the case before the Court the holder has no right to call upon Sir John Perring & Co. to pledge their responsibility for payment; nor can they be sued if they refuse to pay it: there is no privity between them and the holder: this principle is established in the case of *Williams v. Everett*†. In *Bishop v. Chitty*, the bill fell due on the 2d of January, and Caswell and Mount paid till the 19th of that month, and the bill was not presented till the 21st: Lee, C. J. held, that it was the loss of the plaintiff; for this acceptance was in the nature of a draft,

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which is always considered as actual payment, when a reasonable time to receive it is elapsed. The form, therefore, of the acceptance in that case, which was in the nature of a draft on Caswell and Mount, and the neglect of the holder to call to receive it, distinguish it from the case before the Court. In *Sebag v. Abitbol**, a bill was accepted, payable three months after date, at a banker's in London: the bill, by reason of its being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid, and it was held he was not discharged, and the drawer was allowed to set it off in an action brought against him by the acceptor, although the banker, at whose house the bill was payable, had failed about four months after such information was given, and though the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. For these reasons, considering that the money payable by a bill becomes by the acceptance the debt of the acceptor; that he is looked upon as the immediate debtor; that, by making his acceptance payable at his banker's, without putting it in a form to pledge his banker's liability, he only specifies a place, where he by himself, or his agent, will be ready to pay; considering, that he may have no funds in his banker's hands, or has full power to withdraw them; that much trouble and inconvenience, and confusion, may result from holding that this is a conditional and restrictive acceptance; and, that every inconvenience will be sufficiently obviated by holding, that neglect by the holder will be matter of defence to the extent to which such neglect causes loss, I submit in answer to the first question, that, as against the acceptor, the holder of this bill was not bound to present it at Sir John Perring's for payment, nor to aver such presentment in his declaration.

On the second question proposed for the consideration of 2d Question, the Judges, I shall content myself with saying, that, for the reasons which I have already stated, I am of opinion, that, as against the acceptor, such acceptance is a general acceptance, with an engagement or direction that payment may be obtained at the banking-house, with this addition only, that, if the ac-

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ceptor should be able to prove, that by any neglect in the holder in not duly presenting, he had sustained any loss, he should be relieved to the extent of such loss.

In answer to the third question, I submit, that a distinction is to be taken between an acceptance qualified as to time, and an acceptance qualified as to place. If *C.* take from *B.* an acceptance qualified as to time, giving *B.* a longer time for payment of the bill than the bill itself specifies, I consider it as quite clear that *C.* could not sue *A.* upon the bill. The holder of a bill has no right to give the drawer time. If he do, he does it at his peril. *English v. Darley* * establishes that indulgence to the acceptor after the bill is dishonoured, discharges the drawer and indorsers: and there are many other cases to the same effect: if so, indulgence to him before the bill is due must have the same effect. An acceptance qualified as to place, will, or will not, take away from *C.* the right to maintain an action against *A.* upon the bill, according as such acceptance does, or does not, throw upon *A.* an additional burthen, or cast upon him any prejudice. If the bill be payable at a place where the drawee lives, his house is *prima facie* the place at which it is to be paid, but the usage of merchants warrants the drawer in naming any other house at the same place for payment. If the drawee has no house at the place where the bill is made payable, the holder has a right to require from him an acceptance specifying some house in particular in that place, for its presentment. This doctrine is laid down by *Holt*, C. J. in the case cited by my brother *Holroyd* †. But, if naming a particular house casts upon the drawer any new burthen or prejudice, the holder, by allowing such house to be named, has done, as to him, what he was not warranted in doing, and the drawer is discharged. The question then is, Does the qualification as to place cast on the holder a new burthen or prejudice? and, if it oblige him to prove at his peril, in an action against the acceptor, what upon a general acceptance he would not be bound to prove, it does cast upon him a new burthen.

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In answer to the fourth question, I am of opinion, that *C.* would not be at liberty to maintain an action against *A.* on his

* 2 B. & P. 61.

† Lord Raym. 575.

original debt, without delivering to *A.* the bill so accepted; because *A.* has, by the bill offered to *C.* a credit upon *B.* and *C.* has consented to that credit; and *C.* has no right to double payment from *A.* and *B.* *Kearslake v. Morgan** is an authority in point, to show, that if a debtor pay his creditor by a note or bill, which the creditor takes on account of his debt, such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up such bill.

Wood, B. In answer to the first question, I am of opinion, that the bill of exchange mentioned in the first count of the declaration being therein alleged to have been accepted according to the usage and custom of merchants, "payable at Sir John Perring and Co. bankers, London," that is to say, at the house of certain persons using in trade and commerce the name, style, and firm of Sir John Perring and Co. bankers London, the holder was bound to present it at that house for payment, and to aver in his declaration that the same was presented at that house for payment.

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It is clear, that the drawee of a bill of exchange, if he choose to accept it, may do it generally, or may make a special or qualified acceptance. The holder may refuse to take a special or qualified acceptance; but, if he do take it, he is bound by it, as that constitutes the contract between him and the acceptor. There are many cases which might be cited to prove this position, but I will only trouble your Lordships with one. In *Petit, v. Benson*†, a bill was drawn upon the defendant, who accepted it by indorsement, in this manner, "I do accept this bill, to be paid half in money and half in bills;" and the question was, whether there could be a qualification of an acceptance, for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum: so that the question here must have been, whether the words "to be paid half in money and half in bills" would not be rejected, and the acceptance stand as a general acceptance? "But 'twas proved by divers merchants, that the custom among them was quite otherwise; and that *there might be* a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part.

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But he to whom the bill is due may refuse such acceptance, and protest it, so as to charge the first drawer; and, though there be an acceptance, yet, after that, he hath the same liberty of charging the first drawer as he before had:” that is, although there be an acceptance written, if he refuses to take it, he may strike it out and charge the first drawer. It is observable that the case says, the custom was proved by several merchants: at that time, it was usual to set out the custom of merchants in the declaration, and to prove it by witnesses, which accounts for the words “ ’twas proved by divers merchants;” but it was afterwards, in the same sign *, held, that the court was bound to take judicial notice of the law-merchant; and, therefore, it is not usual now to set out the custom, but to allege that, according to the custom of merchants, such an one drew a bill, and such an one, according to the custom of merchants, accepted, &c.

* W. 3.

As there may be a qualified acceptance, is the acceptance in question a qualified acceptance? What makes a qualified acceptance? Why, the words used by the party in his acceptance. Do the words “ payable at Sir John Perring and Co’s bankers, London,” mean nothing? Are they mere surplusage? If so, then this bill ought to have been presented for payment at Torpoint. To make such constructions would, I conceive, be contrary to the usage of merchants, and the plain sense and meaning of words. Acceptance imports a promise; and the acceptance in question is a promise to pay at a particular place, that is to say, at a banker’s in London. An acceptance is an *actual promise* to pay, [per Curiam, in *Mitford v. Walcot* †.] There are two conflicting decisions of the Courts of King’s Bench and Common Bench upon the point in question, viz. the case of *Fenton v. Goundry*, in K. B. and the case of *Gammon v. Schmoll*, determined by the Court of C. B. On those cases I will not trouble your Lordships with my comments: but I must observe, that there is a very material case of *Sanderson v. Bowes*, which, though my brother Bayley does not seem now to think so, I hold to be good law. In that case, a promissory note was made payable at a banking-house, and the Court held presentment at the banking-house

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a condition precedent to the maintenance of the action. I cannot distinguish the case in question, in principle, from this of *Sanderson v. Bowes*, where the defendant promised to pay at the banking-house at Workington, to one R. Nelson, or bearer. The Court of King's Bench on demurrer, held, that it was necessary to present the note for payment at the banking-house at Workington, which seems to me to be contrary to the former decision of that court in the case of *Fenton v. Goundry*, which was the case of a bill of exchange accepted payable at a particular banker's (like the acceptance in this case). The distinction which the Court of K. B. took, was, that the acceptance was no part of the original conformation of the bill itself, but that the words in the note, (in *Sanderson v. Bowes*) restrictive of payment at the place named, were incorporated in the original form of the instrument which alone created the contract and duty of the party. Try this case by that principle; what alone creates the contract and duty of the acceptor? Why his acceptance. There is no antecedent debt due from the acceptor to the holder. What is incorporated in the original form of the acceptance? The place of payment. It is true, that acceptance is a subsequent act to the first conformation of the bill: it is a subsequent contract between the acceptor and holder; but, it is the only contract which there is between them. It is, in point of law, a promise of the acceptor to pay the bill at a specific place. The declaration states, and incorporates in the acceptance as there stated, the very words "payable at Sir John Perring and Co's, bankers," and the promise alleged is to pay according to his said acceptance. The plaintiff by his declaration does not reject these words as surplusage, but considers them as forming part of the acceptance. Suppose, instead of a note, a bill had been drawn on Bowes and Co. and they had accepted it payable at their banking-house at Workington, and subscribed the acceptance, can it be contended, that, in one case, the holder is bound to present at the place, and, in the other, not? I say, therefore, as was said in *Sanderson v. Bowes*, that a demand by the holder of payment of the bill at the specific place was a condition precedent, in order to give himself a title to receive the money.

As to the second branch of the first question, viz. Whether the plaintiff is bound to aver in the declaration, that the bill was

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presented at the house of Perring & Co. for payment? I take it to be a condition precedent that it should be presented for payment at the appointed place; and, if so, without doubt, the plaintiff cannot maintain his action without averring performance of that condition precedent, and so the court of King's Bench held in *Sanderson v. Bowes*. It is not necessary, as between the holder and acceptor, that the holder should aver presentment on the day when the bill becomes due; because the acceptor is liable at all times afterwards, whenever it shall be presented at the appointed place. His liability is not confined to any day; his liability is to pay any time after the bill becomes due, if presented at the appointed place. The presentment on a particular day can only be material to charge the drawer. It has been argued, that presentment need not be averred, but, that it is matter of defence. I think, that it may be matter of defence although not averred; and that, at the trial, the plaintiff ought to be called on to prove it; otherwise, after verdict, it might be presumed that it had been proved to be presented according to the acceptance. If a bill directs the payment at a certain place, it ought to be paid there without other demand than at the place, though the acceptor lives at a place remote*. The place where a bill is to be paid is so important, that, if it be directed to a person generally, and he will not accept it to be paid at a certain place, the holder may protest it. If a bill be accepted at Amsterdam, and no house named where the payment is to be, the party need not to acquiesce in it, but may protest the bill; but, if he will acquiesce, it is well enough†. Then, according to the doctrine contended for, although the law requires a place of payment to be named, yet, when it is named, you are not obliged to resort to it for payment. The mischief to the commercial world, and to all who have any concern with bills, would be very great, if the holder were not bound to present for payment at the appointed place; but, on the contrary, might, at once, without any presentment, bring an action against the acceptor. The acceptor would have no means of avoiding an action (and, perhaps, an arrest); for his acceptance may have been in circulation, and may be in the hands of persons

* Com. Dig. tit. Merchant, 200.

† 12 Mod. 410. *Mitford v. Walcutt*.

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of whom he knows nothing : so that he cannot tell to whom to send or tender his money; or how he is to get discharged; and the first notice which he has of who the holder is may be by an action. Common sense and common justice, and the convenience of mankind, all concur in telling one, that a man, who has agreed to take an acceptance payable at a specified place, should be bound to have recourse to that place for payment before he can sue the acceptor. It has been argued, that the defendant should not have demurred, but should have pleaded that he was ready to pay at the appointed place, but nobody came to receive payment. That, I conceive, was not necessary; because the first act to be done (which is a condition precedent) is the presentment of the bill for payment at the appointed place; and the plaintiff must show that to maintain his action; and so was the determination in *Sanderson v. Bowes*. But, considering the presentment and payment to be concurrent acts, the party who brings the action (not he who defends it) must show that he has done what is necessary on his part to maintain that action, namely, that he has been ready with his bill to present, and thereon to receive payment at the appointed place. In answer to the arguments raised from forms of pleading, I say, that the defendant may avail himself of this objection in different shapes; 1st, as in this case, by demurrer; 2dly, he may plead the general issue, and, for want of proof of presentment, apply for a nonsuit; or, 3dly, he may plead specially, that he was ready at the appointed place to pay, and that no presentment was made, or, generally, that the bill was never presented at the appointed place. It has been argued, that presentment for payment need not be averred, and that it never is averred in a declaration against the acceptor; and I agree, that, where the acceptance is general, it is so; and the reason is this, because the acceptor is always liable; his acceptance operates as a promise to pay, not only at the time when the bill is due, but at all times afterwards when requested, or on demand; and the bringing the action is in law a request or demand. But, where place is of the essence of the contract, as in the case in question, though it be not necessary, to aver presentment at the day, it is necessary to aver presentment at the place on some day before bringing the action. One who is indebted promiseth

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to pay it upon request, or an action upon the case upon that promise, the only mode to express the assumpsit with the request, *per Jones v. Godb.* †; but otherwise it is, where there is such a promise, *in many daily precedent* *. In debt or detinue, the very bringing of the action and demand of the writ is a demand and request †. Acceptance after the time of payment elapsed, and a promise then to pay according to the tenor of the bill, is good, and amounts to a promise to pay the money generally ‡. Arguments have been drawn from forms of pleading in actions on bonds or obligations and other actions in debt, and it is contended that it lies on the defendant to plead either a tender, or that he was ready to pay, and bring the money into court. These rules are not applicable to this case: this is not an action of debt or *indebitatus assumpsit* on an antecedent debt. It is well established, that an action of debt will not lie on the acceptance of a bill of exchange; it is an action on the custom of merchants for damages only, without any antecedent debt. As to debt on bonds or obligations, they create an immediate debt, and the defendant must show that he has done all that was necessary on his part to perform the condition, and that it was the fault of the obligee that it was not completed. But, when the plaintiff brings an action for a demand dependent on a condition precedent on his part to be performed, there he must aver performance to maintain the action, as in *Sanderson v. Bowes*.

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In answer to the second question, I am of opinion, that this bill having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co. bankers, *only*; and, that it is *not* a general acceptance to pay the same with an additional engagement or direction for the payment thereof at that house, for the following reasons: It is the custom of merchants and opulent persons to keep their monies at bankers, and to accept bills to be paid at their bankers, that they may not be under the necessity of keeping money at their own houses, or intrusting money to their servants in their absence to take up acceptances, or of carrying money about

* 4 Leon. 2. Pulmant's case.

† Per Jones, J. Godb. 403. *Hern and Stub's case*.

‡ 1 Salk. 129. *Mitford v. Wallcut*.

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their persons to answer such acceptances, if demands should be made upon them personally. But these acceptances are conveniences to both holder and acceptor. But this object, so far as respects the acceptor, would be totally frustrated, if, at the election of the holder, he, the holder, could reject the appointment of the place of payment in the acceptance as mere surplusage, and demand payment wherever he pleased. What authority is there either in law or common sense to say, that a promise (and an acceptance is a promise) to pay at a particular appointed place by name, is to be expanded (for that I think is the phrase) into a promise to pay in every corner of the kingdom where the acceptor may happen to be, as well as at the particular appointed place. The acceptor is under no previous obligation to pay; he owes no debt to the holder prior to his acceptance; his acceptance is the only thing which constitutes the compact between him and the holder. The expression of one particular place, according to a well-known maxim, is the exclusion of any other. There is no law or custom of merchants to justify such an *expansion*, or rather, I should say, *expulsion* of mens words and meanings. I remember cases of this sort. A person has given a promissory note payable at a particular time, and has signed it; and, after he has signed it so that he has *completed* the instrument, he has put upon the side or bottom of the note a memorandum of a particular place where it will be paid. In such a case the particular place is no part of the note, and does not control its general operation: it is no variance in a declaration to omit such a memorandum: it may, perhaps, amount to evidence of an additional engagement that it shall be paid at that place. But, here, the acceptance is only one single continued sentence, at the end of which, probably, stands the signature of the acceptor.

In answer to the third question, I am of opinion, that, if *A.* draw a bill on *B.* in favour of *C.* for 100*l.* and *C.* without the previous authority or subsequent assent of *A.* take an acceptance of the bill for the whole of the 100*l.* but an acceptance qualified as to the time or place of payment, *C.* could, notwithstanding such acceptance, maintain an action upon the bill against *A.* unless the qualification as to time or place produces a damage or injury to *A.* for the following reasons: If the

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holder, without such previous authority or subsequent assent of *A.* the drawer, enlarge the time of payment by the acceptor, that may injure the drawer and operate to discharge him : or, if he take an acceptance payable at a distant place, so that, if the bill be dishonoured, notice cannot be given to the drawer so soon as it might if the acceptance had been general, that may injure the drawer and discharge him as for want of due notice. But, in the case of a bill drawn on a person in *London*, and accepted payable at a banker's in *London*, I should think such special acceptance would not operate to discharge the drawer, if due notice was given to the drawer of the non-payment, because in such a case the special acceptance does the drawer no injury.

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In answer to the fourth question proposed by your Lordships, I am of opinion, that if *A.* were debtor to *C.* in 100*l.* previous to his so drawing upon *B.* in favour of *C.* to the amount of 100*l.* *C.* could not, upon *A.*'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against *A.* without delivering to *A.* the bill so accepted ; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.* Lest I should have mistaken this question, I will take the liberty of offering some reasons or explanations. If *C.* take the draft of *A.* upon *B.*, for a debt due from *A.* to *C.*, *C.* is bound to use his endeavour to get it accepted and paid ; and, if it be not honoured, is bound to return it to *A.* in due time, and to deliver it up to *A.*, and, that being done, it is the same, then, as if no bill or draft had been given ; and *C.* may then maintain his action against *A.* for his original debt. If the bill have been left for acceptance, and *B.* have written a qualified acceptance upon it, which *C.* does not choose to take, he should inform *B.* that he will not take an acceptance so qualified, and require a general acceptance ; and if that be refused he should strike out what was written, and return the bill to *A.* as an unaccepted bill, in which case *C.* may resort to his original debt against *A.* If *C.* without *A.*'s previous authority or subsequent assent, accepts and assents to *B.*'s acceptance, so qualified as to time or place as materially to alter the condition of the drawer, in that case he can only resort to *B.* ; the acceptor, according to the terms of his acceptance, and *A.* will be dis-

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charged from his debt to C., for which he gave the bill; and B. will be discharged, as against A. from his original debt, for which he gave his acceptance, and can only be sued on his special acceptance.

GRAHAM, B. The general question is, whether the words of this acceptance form a condition precedent, and constitute a qualified acceptance, or a general acceptance with an additional engagement or direction for payment at the house mentioned. If these words do constitute a condition precedent, it was necessary before action brought to demand payment at the place mentioned, and to aver in the declaration that the plaintiff had so done. When a man accepts a bill, it is the most solemn, because it is the most public recognition of the drawer's right to demand the amount of it from him. The acceptance is an obligation to pay all over the world, and the question is whether, generally speaking, in the intention of the acceptor and the understanding of the holder, the words "payable at Sir J. Perring and Co's," contract this general obligation to an engagement that the acceptor will pay the drawer there, and no where else, (as some seem to think), or, at least, not till it be proved that a demand was made there in vain. In my apprehension such an acceptance is no qualification of the general liability of the acceptor. It is a substitution of the banker's for the person and abode of the acceptor, for mutual convenience; and means only to charge the drawer and indorser *in transitu*, that the holder, instead of calling upon the acceptor, should make his demand at the banker's. No demand is necessary against the acceptor; he is liable without demand; but, to charge the drawer, you must prove a demand on the acceptor, or on the person whom he has identified with himself for that purpose. The question, then, will be, does a man mean to impose a condition, or to suggest, for mutual convenience, a place, where, with least trouble to both, the money may be had? But this question, of daily occurrence, simple as it may seem, and of easy solution to some, is rendered complicated and difficult by great and conflicting authorities.

As to the balance of authority, I think it cannot be doubted, from the case of *Smith v. De la Fontaine*, in 1785, what Lord Mansfield's opinion was. His great experience and knowledge

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of mercantile transactions and high character carry with them strong evidence of the prevailing opinion. *Saunderson* and others v. *Judge**, in 1795, was an action on a promissory note (and, for the present, I make no distinction between notes and bills) against the indorser. Sharp, the maker, promised to pay to Wilkinson or order; and, at the foot of the note, there was a memorandum, that he would pay it at the house of Saunderson and Co. with whom he had a cash-account. Wilkinson indorsed to Judge, he to Sanders and Co. and they to Saunderson and Co. Sharp, before the note became due, absconded, and Saunderson wrote by the post to Judge, giving him notice of the non-payment. The declaration was in the general form, without stating the memorandum, or any thing tantamount to an application to the plaintiffs. At the trial, the plaintiffs were nonsuited, as they had not proved an actual demand on the maker; and the language of the court, consisting of Eyre, C. J. Heath, Buller, and Rooke, judges, after the argument upon the motion for a new trial, forms the foundation of my opinion. They said, "It was no part of the contract that the note should be paid at the house of Saunderson and Co.; and therefore that was not necessary to be stated in the declaration: the maker merely appointed the house of his banker as the place where he was to be called upon for payment. It is not necessary that a demand should be personal; it is sufficient if it is made at the house of the maker, and it is the same thing in effect if it be made at the place where he appoints; and as the demand was to be made at the house of the plaintiffs themselves it was sufficient for them to turn to their books." But, it may be said, this was the case of a detached memorandum. I will say a few words on the subject of the supposed difference between such a memorandum at the bottom of a note, and an acceptance of a bill of exchange payable at a particular place. The case of *Lyon v. Sundius*†, was an action by the indorsee of a bill of exchange against the acceptor; the declaration stated only a general acceptance. It was precisely this case, the acceptance being "payable at Messrs. Hankey and Co's." The very same objection was taken by Mr. Park; and I am free

* 2 H. B. 509.

† 1 Campb. 423.

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to say, that the words of Lord Ellenborough carry conviction to my mind, and form the foundation of my opinion. "How can you make the words *payable at Hankey and Co's* more than a mere memorandum? The acceptor of a bill of exchange is liable universally. This very point was brought before the court some time ago," (alluding probably to *Saunderson v. Judge*, of which Mr. Park said he had some impression on his mind), "when," says Lord Ellenborough, "the judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration." It is difficult to believe, I had almost said impossible, that the case should have rested there, if that had not been the opinion of all the Judges of the King's Bench; and, as proof, in the very next year (1809), at the Hilary term sittings, Mr. Justice Bayley held, in the case of a promissory note*, that in an action against the maker there was no necessity to prove that it was presented where payable. These authorities are followed by the decision in *Fenton v. Goundry*, on the fullest consideration of *Callaghan v. Aylet*, then lately determined in the Common Pleas. I cannot help adding the two decisions at *Nisi Prius* of Lord Chief Justice Gibbs†; these, together with the common form of declarations, make a weight of authority which it is difficult to counterpoise.

But it is said, in order to diminish the weight of these authorities, that the Court of King's Bench have not always been consistent. And first, it is said, that in *Parker v. Gordon* ||, they have recognized the propriety of an application at the place of payment. But that was an action against the drawer; and it is universally true, that to charge the drawer you must prove a demand on, and refusal by, the acceptor or his substitute. If, therefore, he says, "I accept, payable at my banker's," he says, "it is there I am to be called upon for payment; that is my house; there it is where I am to be found, and I authorize you to consider me as personally present there for the purpose of payment:" and, if so, the holder may be presumed to know the banking hours. And if the holder were not bound to this, he must have gone, as Lord Ellenborough

* *Wild v. Rennards*, 1 Campb. 425. n.

† *Head v. Sewell*, *Richards v. Milsington*, Holt, N. P. C. 363, 364.

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says *, “ a step farther, and proved a demand on the acceptor, for otherwise no demand is made on the acceptor. Secondly, it is said, that they have impaired, if not contradicted, the case of *Fenton v. Goundry*, by that of *Sanderson v. Bowes*: this argument or assertion is founded on the supposed perfect analogy between bills of exchange and promissory notes. I perfectly agree, that in some cases place may be essential, and may be rendered so by the terms and occasion of the acceptance. A case may be put of a man, who remitting all his property to England, and taking his departure from India, accepts a bill for 5000*l.* at six months payable in London: he loses his passage: it could never be said in such a case that the acceptor engaged to pay in India, or at the Cape of Good Hope, on his way home. The case of bankers issuing notes payable at their banks, as in *Sanderson v. Bowes*, may be one of these cases; but I deny the alleged analogy between bills of exchange and promissory notes. The maker of a promissory note may express his own terms. He is, as it were, drawer and acceptor; the note must be taken as he issues it. But in the case of bills of exchange the drawer has a right to an unqualified acceptance, and an indorser *in transitu* is entitled to the same right. If these acceptances were construed as special, and as qualifying the general liability of the acceptor, who is bound to pay, it would hurt the credit of bills. The acceptor is the person whose credit principally supports the bill; he is considered as always liable; but if an accidental or careless omission to call at the place appointed destroy the acceptance of the bill, the confidence attached to the acceptance is gone, and the credit depends on the punctual observance of the terms of the condition. The proof of a demand and refusal is not easy; and in many cases might fail, or be brought in doubt by contradictory evidence. The case of *Fenton v. Goundry*, then, can hardly be said to be impugned by that of *Sanderson v. Bowes*. At all events, the latter case may be considered as wanting the weight of the former; but it is sufficient to distinguish them by the difference of the subject-matter of each case. It is, thirdly, said this is an order on the banker; I grant, that it is an authority to the banker to pay, and in

* In *Parker v. Gordon*, 7 East, 386.

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effect, an order; but we must not by refinement stagger prevailing notions. If it be an order on the banker, *Bishop v. Chitty* is a dangerous precedent: no man of business ever thought that such a note or memorandum converted the bill of exchange into an order on the banker; and, that by not calling at the banker's he lost the benefit of his acceptance, and took the credit of the banker in the place of the acceptor. As to the cases in the Common Pleas, I shall not oppose to the case of *Ambrose v. Hopwood**, that of *Huffam v. Ellis*†, in the King's Bench, and House of Lords; in the latter, the declaration followed the case in the Common Pleas, and the words, according to the tenor, might include the house. In *Callaghan v. Aylett*, and *Gammon v. Schmoll*, is to be found the great counterpoise to the authority of the Court of King's Bench; but, I must say, that the reasons given are not such as belonged to the authority of the judges, who are reported to have given them. In *Callaghan v. Aylett*, Mr. Justice Heath says, "there can be no difference in this respect between an action against the drawer, and an action against the acceptor." But, there is this difference, when the acceptor accepts "payable at the house," he means to limit his ubiquity, by saying that he is to be found there for the purpose of payment; and if the holder do not seek him there, he makes default in calling on the acceptor. If, without such direction, the holder omit to call at the house of the acceptor, he cannot, on account of that omission, charge the drawer or indorsers: but it is too much to say, that by that omission he discharges the acceptor, who is at all times liable, though no demand of payment was ever made, even at his house. Mr. Justice Heath avoids the authority of *Saunderson v. Judge*, by saying, that there "it was a memorandum at the foot of the note, not a part of the instrument." That leads to nice, I had almost said, frivolous, distinctions; for, according to that doctrine, if I say, "I accept *R. G.*" and add at the foot of the bill, "payable at Messrs. G. & Co." it is a mere memorandum; but if I say, "I accept, payable at Messrs. G. & Co." it is embodied in my acceptance, and forms a condition precedent. Does it make

* 2 Taunt. 61.

† M. 51 G. 3. K. B. See Bayley on Bills, 98. n. 1. 3d ed.

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a difference, that in one case the acceptance is all in one tenor, as "I accept, R. G. payable at my bankers," and that in the other I write, "I accept, R. G.," and underneath, "payable at my banker's?" A man, whether he accepts in the former or latter form, means the same thing; for when he writes the words "payable, &c." he is usually determined in what place to write, by the room or vacancy on the paper: Are the minds of men in business to be harassed with such untenable and insuperable distinctions? In *Gammon v. Schmoll*, Mr. Justice Chambre puts the case of a bill drawn upon a judge just going the circuit. I dare say it has happened to him, as it has happened to me. But can it be supposed that any man of character, on such or like occasion, would make his bill so payable if he had not cash or credit at his banker's? And who would refuse to call at the banker's? No holder in his senses would forbear to follow the directions of the acceptor, because it is undoubtedly done for his convenience; no man in his senses would refuse an application to the banker of the judge where he would be sure of his money, for the gratification of coming down to Exeter for the sake of arresting him: but if it turn out that an acceptance payable at a particular place is a mere shift, or act of roguery, it would be idle, and, in some instances (as in directions to obscure corners and streets,) almost impossible to attempt to find out a sneaking lodger in a garret to satisfy this indispensable condition. What holder, or what attorney, would arrest a man of credit under such circumstances, or would disgrace a Judge? Such acceptances will always give credit to bills; and the practice will continue, though your Lordships should decide that they do not *qualify* the general liability of an acceptor; and perhaps the mercantile world will thank your Lordships for not imposing upon them the knowledge of precedent conditions, or a speculation, as to the different positions on a note, by the occupation of which the words "payable at, &c." become either a mere memorandum, or a condition precedent. But cases might be put of vexation; these may all be met by way of defence. It is said, (1 Rolle's Abridgment, 444) and I take it to be law, "If the condition of an obligation be to pay 10*l.* at a given day at S., he (the obligor) is not bound to pay in any other place;" and "so in that case the obligee is not bound to receive it in any other

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"place;" and so Coke, Littleton, 211; "For if the obligor then (that is, when by notice the obligor has fixed the place) and there tenders the money, he shall save the penalty of the bond for ever." But he saves only the penalty and costs; he must pay the debt. An acceptance is, by the custom of merchants, a debt; though, independently of that custom, neither debt nor assumpsit would lie for want of consideration. But in all these cases the fulfilment of the condition comes by way of defence. The obligee is not bound in the outset to state his demand at the place; the defendant must plead his performance of the condition, and, proving it, he is quit of the damages and penalty; but he must bring the money into court. Place may, undoubtedly, be essential; and here both obligor and obligee understand each other that so it is to be considered.

In answer to the third question, I am of opinion, that if the holder of a bill for acceptance take an acceptance, varying in time or place of payment, where place creates inconvenience, and obstructs or impedes the circulation of the bill, or, when new terms or conditions are introduced, he makes it his own. This is obvious in the case of enlargement of time. So, if the acceptance be payable at Paris, Dublin, or Edinburgh, where the place is evidently made a condition of the payment; in such a case, I think that the drawer would be discharged.

3d Question.

In answer to the fourth question, I am of opinion, that if, in the case put, C. take an acceptance, materially qualified as to time or place, and A. dissent, and C. still keep the bill, he makes it his own, and cannot sue A. on his original debt: but if C. give timely notice to A. and immediately offer to return the bill to A. I think his original cause of action would remain.

4th Question.

Once settle the uniformity of practice, and the evil is over. But, according to the law as laid down by the court of King's Bench, you have a plain simple declaration and proof. According to the law laid down by the court of Common Pleas you have a new form of declaration, and a proof which, in many instances, may be difficult, and may lead to controversy and contradiction.

RICHARDS, C. B., as to the first question, was of opinion that the holder of the bill was not bound to present it at Sir John Perring's & Co. for payment, nor to aver presentment there.

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As to the second, that the acceptance of the bill in question was not a qualified acceptance, constituting an undertaking to pay the bill at the house of Sir J. P. & Co., but a general acceptance, constituting an undertaking to pay the same every where, with an additional engagement or direction for the payment thereof at that house.

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As to the third, that if the payee *C.* were, without the previous authority or subsequent assent of the drawer *A.* to take an acceptance qualified as to time or place, by taking such an acceptance he would discharge the drawer *A.*

4th Question.

As to the fourth, that if *A.* were to refuse his assent to such a qualified acceptance, *C.* having received the bill for the debt of 100*l.* due from *A.* could not sue *A.* for the debt till he had re-delivered the bill to *A.*

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DALLAS, C. J. With respect to the first question, I am of opinion that the holder was bound to present the bill at the banking house of Sir J. P. & Co., and so to aver in the declaration.

2d Question.

As to the second question, I think that the bill, having been so accepted, is, in law, to be considered as a conditional acceptance, and not as a general acceptance to pay, with an additional engagement or direction for payment at the house mentioned. And as the case which has given occasion to your Lordships questions has arisen from contradictory decisions in the courts below, and as, in the recent cases, all that could be found of former decision has been brought under the consideration of the respective courts, and their disagreement in opinion has still continued, and continues, (as appears from the answers hitherto given,) it is obvious that the present is a case which can very little depend upon mere authorities; the authorities have, however, been already fully referred to, and my reasons will therefore chiefly and shortly be given upon general grounds. And, first, I admit the presumption of law to be, (though in the present state of commerce the fact is frequently otherwise,) that the drawing a bill of exchange pre-supposes an antecedent debt, and the acceptance is an admission that such a debt is due. And so considered, it is, no doubt, clear, that the debtor may be called upon to pay without reference to time or place. But if, in the bill itself, the drawer were to name a particular place for payment, instead of such place

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being specified in the acceptance only, such bill would be a bill qualified as to payment both with respect to time and place. And the acceptance being according to the tenor of the bill, the acceptor, as to payment, would be bound accordingly. This, I am aware, would be the act of the drawer himself, and therefore not falling within part of the reasoning, as it applies to the acceptor, a distinction to which I shall hereafter advert more fully. It is, I apprehend, equally clear, that by a bill drawn generally, the drawer transfers his rights against the drawee, as modified by the bill, to the extent of the bill; and that the drawer may enter into any contract with the payee, which the drawer might have done with the drawee before such transfer made, not affecting thereby, in substance, the rights of the drawee. I assume, therefore, for the present, that if the bill had purported to be an order to pay at the house of Per-
ring & Co., and the acceptor had accepted such bill, he would not have been bound to pay elsewhere till application for payment there had been made and failed. I shall endeavour to show hereafter, that what the drawer may do by the bill, as between him and the drawee, may be done by the acceptance, as between the acceptor and the payee. To take, first, the case of the drawer of the bill: he may draw it in any form which he thinks fit, provided the form be such as is warranted by the usage of merchants, without which it will not be a bill of exchange; but it will scarcely be contended, that drawing it restrictive as to place of payment would be a violation of such usage. A bill general and absolute, in the first instance, drawn and accepted generally, operates according to the terms of the bill; and the bill itself need only to be looked to, the acceptance referring to and not varying from the bill. But to a bill so drawn, the drawee may refuse acceptance; and he may propose to accept conditionally, the payee being at liberty to receive or refuse such conditional acceptance; if he refuse, he must go back to the drawer, who will have his remedy against the drawee, and in this, the first and most simple view of the subject, the bill itself is at an end.

Suppose, however, the case of a partial and qualified or conditional acceptance; and that an acceptance may be such in many respects has been admitted by all the learned Judges in succession: indeed the very questions put by your Lordships

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recognize the distinction, and adapt themselves to it. What, then, is meant by conditional acceptance, or in what respects may an acceptance be conditional? It may be so as to time, as to sum, as to place, as to mode of payment. It will be sufficient to refer to the authorities which have been cited as to each of these shortly, and one will be sufficient under each head; and I mention them, not because the point itself is doubtful, but for what is said in each case. And, first, as to amount. A foreign bill was drawn upon the defendant, and he accepted it to pay 100*l.* part thereof; he was sued on the acceptance, and on demurrer, insisted that a *partial acceptance was not good within the custom of merchants*; but the Court held otherwise, and judgment was given for the plaintiff*. Next as to time. A bill was drawn, and no time fixed for its payment; it was presented on the 18th of April, and accepted payable the 8th of September; this being stated in the declaration, the defendant demurred, and insisted, that as no time was prescribed for payment the bill was payable at sight, and that a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held that it was an acceptance within the custom, and the demurrer was over-ruled†. Thirdly, as to place. On this point also there are numerous authorities; but as it is in this respect that the present controversy has arisen, I assume only, at present, that this also may be conditional, reserving myself to examine the authorities and doctrine hereafter. Lastly, as to mode of payment. A bill was accepted, to be paid, half in money, and half in bills, and the question was, whether there could be a qualification of an acceptance? And it was proved by divers merchants that there might be, for that he who might refuse the bill totally, might accept it in part; but that the holder was not bound to acquiesce in such acceptance; *Petit v. Benson*‡. If, then, there may be a conditional acceptance as to sum, as to time, and as to mode of payment, such acceptance, as to these, qualifying the liability to pay, it is difficult to conceive why there should be any difference as to place, at least as between the acceptor and the payee so taking the conditional accept-

* *Wegerstoffs v. Keene*, Str. 214.

† Comb. 452.

‡ *Walker v. Attwood*, 11 Mod. 190.

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ance; nor do I conceive, speaking with deference to other opinions, that there is any distinction which, upon principle, can be supported. Losing sight of place, however, for the moment, let the effect of a conditional acceptance be examined in the other respects already mentioned. And first as to amount; he who takes an acceptance for less than the sum expressed in the bill cannot claim from the acceptor more; though, as to the drawer, how it may affect him will form matter of distinct consideration. So, as to time, the holder is likewise bound by the terms under which he has consented to take the acceptance: and why? Because, on the one hand, the payee not being bound to take an acceptance, except according to the tenor of the bill; and, on the other hand, the acceptor being only bound to accept as he may choose to accept, when the acceptance varies from the tenor of the bill, and the payee, notwithstanding, takes such acceptance, he consents to take the bill according to the tenor of the acceptance, and not according to the tenor of the bill.

So, it is as to sum, as to time, as to mode of payment; in each of which cases the acceptance, it is admitted, forms the contract between the immediate parties. Is there, then, any difference in this respect, as to place, and as to place only? In the argument at the bar, (and herein the case seems to me now narrowed to a single point,) it has not been disputed that there may be a conditional acceptance as to place, restrictive of payment, and making presentment necessary at such place, provided it be by words of express and unequivocal import; but it is denied that to make a bill payable at one place is an exclusion of others; and in *Fenton v. Goundry*, I observe, Mr. Justice Holroyd, who there argued against the restricted liability, seems to have taken the same distinction. "The case has been argued (he said) as if the terms of the acceptance had been payable at Sikes & Co's. *only*," not contending, that if so drawn the payment would not have been restricted; and Lord Ellenborough is made immediately to observe, "Is it more than an expansion of the promise?" An observation, which his Lordship could not have made, if by the word *only* the promise had been, in terms, restricted; and, in the same way, in the case of *Gammon v. Schmoll*, in the Court of Common Pleas, it was not denied at the bar, that if the acceptance had

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been at the place named, and not elsewhere, in such case the acceptance would have been clearly qualified, and conditional and restricted as to place. And so, yesterday, it was admitted by my brother Holroyd, and so, to-day, it is admitted by my Lord Chief Baron. The question, therefore, in this view of the subject, comes round to be merely a question of construction, namely, what do the words of acceptance import in the particular instance? and are they conditional as to place of payment or not? There are no technical words, by which, generally speaking, a condition must be created; and, whether it be a condition precedent, a concurrent act, or a mutual promise, must be collected from the intention of the parties, reference being had to the words made use of, and the subject-matter in question. And so again, it has been admitted by both the learned Judges to whom I have last referred. "Intention (said my brother Holroyd, in express terms) is that "which ought to govern." Now conditional or qualified, as opposed to absolute, I can only say imports some qualification or restriction of that, which would be otherwise unconditional. This is self-evident, it will be agreed, when the condition is established; but so to state it, it is said, is but begging the question, or leaving it at least where it was before, the question being, whether the words operate by way of condition, and not upon the effect of the condition when established. Still, however, I can only say, the very departure from generality of expression to me, imports some modification of that generality; and, if simple and absolute acceptance have a clear and simple operation, and will bind a party to pay wherever his acceptance may be presented, it seems to me but reasonable to intend, that when he accepts, payable at a particular place, he means to exclude, in the first instance, a liability to demand in any other place. And, looking to intention, and taking as admitted, that it ought to govern, I cannot permit myself to doubt, that the words made use of in this instance are, in fairness of construction, just as clear as if express words of restriction had been introduced. The maxim referred to from Lord Bacon by my brother Holroyd, (I speak it with deference) appears to me too technical as applied to such an instrument as a bill of exchange; nor would it govern in another view; for in a promissory note it is agreed that express words of restriction are not necessary;

words of appointment and specification being of themselves sufficient. In none of these is the word "*only*" to be found, nor any words beyond those which belong to this particular case; and yet the rule of construction, as mere construction, must, in each instance, be the same. I think this upon the mere ground of the words themselves, but I think so, still more strongly, on the sense and reason of the thing. I will, first, put the case of a bill accepted payable in a town different from that in which the abode of the acceptor may be, as for instance, and to avoid extreme cases, a bill accepted in Birmingham payable in London; and I will further suppose it to be a bill according to the original simplicity of such transactions, that is, for an antecedent debt from the acceptor to the drawer of the bill. By his acceptance payable in London the acceptor promises to have a fund in London when the bill shall be presented; he may have sufficient to pay the bill, but not beyond it, and yet, according to the argument which would reject the words of specification as words of limitation, he must have that which he may not possess, that is, a double sum or sums, one forthcoming in London, and another in Birmingham, to take his chance as to the place where, in fact, the bill may be presented when due; or be left exposed to an arrest, as the immediate consequence of non-payment. I am aware, it may be said that such would be his situation under the original debt to the drawer, and that such would continue to be his situation under a general acceptance; but it is for the express purpose of guarding against this, and on other grounds of personal and commercial convenience, to which I shall presently advert, that the practice has obtained of partial and qualified acceptance as to place, and to which, as between the immediate parties, I do not see any possible objection. It has been very properly said, in one of the cases cited at the bar, the convenience of the thing is generally in support of such qualification; most persons keep their money at their banker's, and make all their payments there; there, they or their appointed agents for this purpose are to be found, and there, if any where, is the fund out of which the payment is to be made. To this it may be added, that the very prevalence of the practice proves the convenience; and though I will admit, that mere concurrence is not to make the law, yet, in all commercial transactions it is

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greatly to be regarded, as the footing and foundation on which men deal together; and the course of such dealing, as between merchants, is often that which, of itself constitutes the law. It is scarcely necessary to refer to the stronger cases of a bill accepted in London, payable in Dublin or Edinburgh, or a bill accepted in the West Indies, payable in London. And suppose that, in this latter case, the party accepting has remitted to his correspondent in London the produce of his plantation, for the express purpose of meeting the bill, will it be said that notwithstanding he may still be arrested in the West Indies, because for the original debt he was liable to be arrested anywhere? And yet the argument which treats as of no effect specification of place of payment stops nothing short of this extent. Nor do I see, in any one respect, where the line is to be drawn, or the distinction to be made. If, then, it would be so in the instance of a bill accepted in one town payable in another, or in one country payable in another, let the case be considered of a bill, the parties living in the same place, and accepted payable at a particular banking-house. It is scarcely necessary to say, that to the holder it can be no inconvenience to present it there; but on the other hand, I admit it would be scarcely any inconvenience to the acceptor to have it presented at his counting-house, or place of abode; for, even if it were an absolute acceptance, it would still, according to all probability, be paid by a draft on his banker, the acceptance on the bill only operating as such order; but, even in this view, it weighs something, though possibly not much, that this would be to subject the payment of a bill to a double instead of a single operation, namely, the having two places to apply to instead of one; and, though this would be an inconvenience imposed upon the holder by himself, still that which is not in the natural course of dealing raises a presumption that such departure from it was not meant. And what would be thought of the conduct of a holder, who, having a bill payable at a banker's, instead of going there should go to the house of the acceptor merely to get his draft for the bill, or should further insist on a specific payment in money or bank-notes?

To wind up, therefore, what I have to observe upon this part of the subject, on the reason and fitness of the thing, on principles of justice and mercantile convenience, and from the

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very nature of such transactions, I think a particular place of payment being part of the acceptance of the bill, imposes upon the holder, because he is the willing holder of such acceptance, the necessity of presenting it, in the first instance, there; and leaves the acceptor only liable to pay, where he has provided and fixed a fund for payment, and has consented to pay, in order that he may not be called upon to pay where he has no such fund, nor given any such consent. Nor can I quit this part of the subject without adding, that I do not see a possible inconvenience which can result from so deciding; for the holder need not take a bill so accepted; and where the remedy is so obvious, and it turns simply on a point, except that confusion in this respect has crept into the subject by disagreement in the decisions of courts of law, and that it is fit the law should be settled and uniform, the question seems to me hardly worthy of the attention which it has excited, and the consideration which it has undergone.

Deeming, then, presentment at the appointed place to be a condition precedent, I will only further say, that I think it necessary that such presentment should be averred and proved; and, that non-presentment and having funds ought not to come by way of defence, as, in the case of promissory notes, has been decided by all the courts in *Westminster-hall*, and from which, notwithstanding what I have heard this day, I do not myself feel disposed to dissent. Presentment, according to Lord Ellenborough's opinion in *Sanderson v. Bowes*, at the appointed place, is a condition precedent; and for want of such an averment the declaration is bad. The argument, therefore, as to this point, resolves itself into the question, whether condition precedent or not? For, admit it to be so, then, in this respect, there is no difference between the two courts, and the cases of promissory notes apply to bills of exchange; while, on the other hand, if it be not a condition precedent, it is of course not necessary to be averred.

Quitting now the general ground, I come next to the analogies which result from other cases mentioned, if not of the same, yet of a similar description. And first as to promissory notes. It is scarcely necessary to advert to what has been said as to the similarity, or the distinction between promissory notes and bills of exchange. In some respects, undoubtedly, they are

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different, in others it may almost be said they run into each other. A bill has, indeed, generally, three parties, the drawer, the drawee, (if accepting, becoming the acceptor,) and the payee; but there may be only two parties, as where a person draws a bill on another payable to his own order, and this, in legal operation, is rather a promissory note than a bill. It is usual, however, to declare on it as a bill; not admitting the identity of drawer and payee; and, if accepted, the defendant may be charged in one count as the drawer, in another as indorser, and in the third, as the maker of a promissory note. If or bear to allude to the cases which turned upon the distinction in the address of the note between "at" and "to," in one of which it was said by Lord Ellenborough *.—"This is properly declared on as a bill of exchange, though it might have been treated as a promissory note at the option of the holder;" and, in another of which †, it was observed by Lord Chief Justice Gibbs, "It would be difficult to say, in most cases, that what is law, as regards bills of exchange, is not law as it respects promissory notes:" but paramount in point of application is what was said by Lord Mansfield in *Heylyn v. Adamson* ‡ and which has been so often mentioned that I shall content myself with merely referring to it.

Such, then, being the similarity, and, in some instances, the identity, of promissory notes and bills of exchange, let it be seen what has been determined with respect to promissory notes; premising only, that here, at least, there is no clashing of authorities: for though the decisions in the King's Bench, as far as respects promissory notes, are denied to have application to bills of exchange, the decisions in the Common Pleas, as to bills of exchange, of necessity include promissory notes; and so far, then, as concerns promissory notes, there is no difference of opinion whatever. What then has been decided respecting promissory notes? In this, the decisions of the two courts agree; namely, that a promissory note, containing in the body of it a promise to pay at a particular place, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Now on what grounds of reasoning do such

* In *Shuttleworth v. Stevens*, 1 Campb. 407.

† Burr. 669.

‡ *Richards v. Milsington*, Holt, N. P. C. 364. n.

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decisions stand? To take one case of the many,—In *Sanderson v. Bowes*, it is said by Lord Ellenborough, “An action on a note will not lie unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them;”—and, having thus stated the ground of convenience, his lordship added,—“then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment the declaration is bad.” Apply this doctrine to bills of exchange.—If convenience require that the makers of promissory notes should be liable only where they have expressly made provision to pay, how is it possible, in this respect, to distinguish promissory notes from bills of exchange? Is not the convenience precisely the same in the one case as in the other?—and being the same, how is it to depend on the form of the instrument? Call it what you will, or make it what you may, it is in payment, in each instance, that the transaction is to end; and the note or bill is the means, and nothing more, by which payment is to be procured; as far, therefore, as to a particular place of payment being pointed out, or a specific place of deposit being established, the reasoning applicable to each is precisely the same; and it seems to me impossible to distinguish between the two. An expression of Lord Ellenborough’s has, however, been much observed upon, namely, “that a specification of place is but an expansion of the promise to pay.” It will not be supposed that I mean to follow any of the verbal or critical remarks which have been made in this respect, at the bar, or in the courts below. Whatever peculiarity of expression might, at times, belong to this noble and very eminent person, it was, generally speaking, a peculiarity of force adapted to his peculiar vigour and energy of thought. But to the substance of the expression as authority it will be necessary to advert, in order to see how it has been understood and explained by those who have applied it in support of the doctrine of non-restricted acceptance. In *Gammon v. Schmoll*, the leading counsel at the bar, who was to support

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the doctrine of universal liability, explained it in this way :
 “ every general acceptor has a double liability ; he is in default, first, if the bill is presented to him personally, wherever he may be, and he does not pay it ; secondly, he is in default if it be presented at his place of abode, and not paid : to these, by a qualified acceptance, he adds the obligation to pay it if it be produced at the place,” that is, the place specified. He must be prepared “ with *triple* funds to pay the bill, as well where his person is, as where his abode is, and also, at the particular place mentioned : this is what Lord Ellenborough means by an expansion of the promise.” This is a complication of expansibility which seems to me a strange departure from simplicity of proceeding ; and, for myself, I can only say, I would not so understand it, if I could understand it to any other effect ; but it is impossible to deny, whatever might be intended by the mode of expression itself, that in sum and substance it does amount to this. But whether every man who accepts a bill of exchange, by his acceptance at a specific place undertakes to pay at every other place if required, and to have a *triple* instead of a double or a single fund to the amount of the bill accepted ; or whether he makes his own situation worse, by making that of the holder, in one respect at least, better, that is, by pointing out to him a definite place of payment, instead of leaving him to search where he, the acceptor, is to be found, when the bill becomes due, it is not for me to pronounce, but for your Lordships to consider. Or why, again, this should be in the case of a bill of exchange and not of a promissory note, is that which I am not able to understand.

I now come to that, which it is said, however, makes the distinction between bills of exchange and promissory notes, so as to make the reasoning as to the latter inapplicable to the former. And this distinction is said to consist in the form and nature of the respective instruments. First, then, as to the *form*. In a promissory note, it is said, the words are incorporated in the very body of the instrument, which creates the contract and duty of the party ; whereas, in a bill of exchange, they are no part of the bill itself, but distinct as acceptance, and collateral to it. A promissory note is merely the promise of the maker ; the acceptance of a bill of exchange is a compliance with the order of the drawer. To a promissory note

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there are but two parties ; to a bill of exchange there are three, and the drawer has rights as well as the acceptor and payee. And to this I agree. But here again, at least, as between the acceptor and the payee, there is no distinction : in each instance a debt must be pre-supposed, and in each it is an undertaking to pay. It is said, that in the case of a promissory note the instrument creates the contract ; and, no doubt, it does, that is, the contract to pay in the particular manner, but not the antecedent debt ; the obligation to pay existed anterior to the note ; and though, in the case of a bill of exchange, the debt had also pre-existence, the precise obligation to pay is created by the acceptance, and, be it promissory note, or be it bill accepted, it is, in each instance, but a promise to pay ; and, without such promise the bill itself, as to the acceptor, would be a mere nullity.

To advert, however, to the situation of the drawer, and this brings me to the third question. And, first, with respect to time : in this the learned judges all agree that giving time will discharge the drawer. Extending the time mentioned in the bill would be giving more time than the drawer has said by the bill he chooses to give, which, as against the drawer, the payee can have no right to do ; and, taking an acceptance at a shorter date, if, in case of non-payment, it would give an immediate action against the drawer, would thereby make him liable sooner than he undertook to be ; he being liable only in case of non-payment by the acceptor, and this at the end of the stipulated time. I need scarcely add, it would be the same as to place, if place, from its nature, should resolve itself into time. It remains, therefore, only to consider place as unconnected with and independent of time. And, so considered, it may, or it may not, be material to the drawer. Suppose all the parties to live in the same town, whether the bill be accepted at the counting-house, or at the banking-house, can make no real difference to the drawer ; in other cases, from distance, it might be material ; but, at all events, I think, that if it put the drawer under greater difficulties than he otherwise would be under in point of proof of proper presentment, if bringing an action himself, it is a difficulty which I hold the payee has no right to impose upon the drawer, whose rights should remain unaltered, as ascertained by the

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bill: whether those rights were altered or not would depend on the particular case. Perhaps, however, it would be more reasonable and convenient than making it depend on situation in each particular case, which might generate innumerable questions and give rise to great uncertainty, to hold, at once, the drawer discharged, the payee having taken such acceptance without notice, and thus acting at his own peril; and thus all inconvenience would be guarded against, by making it necessary to give notice to the drawer.

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With respect to the last question, I am of opinion, that under the circumstances stated, C. could not maintain an action against A. without delivering up the bill, and this for the reasons given by several of the learned Judges, and which I do not feel it necessary to repeat.

In the above observations, I may appear to have built much on the decisions as to promissory notes; but it has been said these decisions themselves, perhaps, in point of law ought not to have taken place. To this I can only answer—first, that it is impossible for me to doubt of the validity of these decisions, numerous as they are, recognized and confirmed as they have been by every court, and never, in a single instance, having till this day been drawn into doubt by even a single Judge. If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand: but, *here*, disclaiming even those decisions as decisions, and recognizing only the principle on which they proceed, I say, that, if the case of a promissory note were to occur *now* for the first time, it ought to be decided as those cases have been decided; and further, that without deriving authority from the decisions as such, the principles on which they have proceeded, and ought still to *rest*, apply equally, in my judgment, to bills of exchange. On the whole, therefore, my opinion is formed, as to bills of exchange, even without reference to the decisions as to promissory notes, and still less have I referred to the cases of promissory notes for the purpose of proving the decisions of the Court of King's Bench inconsistent each with the other, but for the purpose of respectfully adopting the decisions of that Court where they agree with the decisions of the other Courts, and thus affording principles decisive, in point of law, of the same question as to bills of exchange. And here, with-

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out repeating what has been said by other Judges in answer to the cases put of actions in debt on bond, or demand of rent, I will only further say, that these do not appear to me to be cases analogous to bills of exchange, which depend on peculiar and appropriate grounds of commercial law, altogether distinct and different, and which, it must be agreed, the custom and usage of merchants is to decide. And this leads me to the only point on which (independent of the different opinion entertained by several of the learned Judges, and of the very able reasons by which their judgments have been supported) I am bound to say I feel some degree of difficulty ; and that is, as to what has been said of the understanding and usage of merchants with respect to the question under consideration. If qualified acceptances as to place have hitherto circulated on a settled and general understanding, that place does not operate by way of limitation as to payment ; as far as concerns the first question, which points to the usage of merchants, I am bound to admit, that I ought to have answered differently ; and, further, that if so, the greatest part of my observations fall to the ground. Looking, also, to the second question, the consequence would, I apprehend, be the same, that is, as to the legal effect ; for a bill of exchange, being altogether the creature of mercantile usage, recognized, however, by the law, such usage would constitute the law as applicable to such an instrument : it is not to be overlooked, that it has been asserted by high authority, that, in circulation and practice, supported by mercantile opinion and understanding, a conditional acceptance does not operate as I conceive it to do. Not meaning to doubt that such information has been given ; still, if the decision is to turn on this single ground, I could wish the fact in some way or other to be regularly ascertained. I will take the law from the learned Judges, whose office it is to expound the law ; but, if the law is to depend upon fact, and fact on testimony, I desire, if possible, to have testimony through the regular channel. This creates a difficulty with me, subject to which, I will only in conclusion add, that, for the reasons which I have given, I adhere to the answer, which I have humbly presumed to submit.

ABBOTT, C. J.—In answer to the first and second questions, *Abbott, C. J.*
 I think the defendant in error was not bound, in order to entitle himself to sue the plaintiff in error, who is the acceptor of the. *1st and 2d Questions.*

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bill in question, to present the bill for payment at the banking-house of Sir John Perring and Co. nor to aver in his declaration that the bill had been so presented; for, I think, the acceptance is not to be considered in law as a qualified acceptance to pay the bill at the house of Sir John Perring & Co.; but, as a general acceptance to pay the same, with an additional direction to the holder to call for payment at that house, instead of calling at the house of the acceptor, as he would otherwise do.

These two questions appear to me to depend entirely upon the meaning and import of the words "payable at Sir John Perring & Co.'s, bankers." There can be no doubt that the drawee may qualify, because he may refuse his acceptance. The question is, whether he is to be considered as having done so by this expression? I conceive that the true meaning and import of all phrases is to be sought in usage, rather than in a strict and literal interpretation of the words of the phrase; and, that in mercantile instruments the usage of trade and commerce is that to which we are to resort. There are many words and phrases in all languages, of which the meaning varies with the subject and the asion to which they are applied. I shall take leave to ^{postpone} the delivery of the grounds of my opinion on the ^{two} questions until after I have stated my opinion on the third question, and the reasons of that opinion.

3d Question. I understand the expression "take an acceptance," as used in this third question, to mean consent to such an acceptance; and, so understanding it, I am of opinion that C. could not, in the case proposed, maintain an action upon the bill against A. upon the refusal of payment by the acceptor. There is not, I apprehend, any doubt or difference of opinion upon so much of this question as supposes an acceptance qualified as to time: and, in my humble opinion, a qualification as to the place of payment has the same effect as a qualification as to the time of payment.

I conceive, that in estimation of law all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing, (which seems to have been usually the case in the infancy of those instruments) at least intended by the drawer, and expected by the drawee to be placed in the hands of the latter before the maturity of the bill.

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And a person who draws a bill under such circumstances may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse to pay according to such election, he would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received, according to the intention upon which the bill is drawn. By an intention to place value in the hands of the drawer, I mean an intention to place it in the course of some mercantile transaction between the parties, such as the consignment of merchandise in pursuance of orders of the drawee, constituting the relation of seller and buyer; or a consignment for sale on account of the consignor, constituting the relation of principal and factor or agent; and not a mere promise to provide for the bill at maturity, by the transmission of money or other bills for that special purpose. The latter practice has indeed prevailed to a great extent in modern times, and bills of exchange have become rather instruments for raising money, or postponing payment of debts by a fictitious credit, than instruments of real mercantile transactions. But notwithstanding such practice, I apprehend they are to be considered in courts of law as founded upon real and mercantile transactions, according to their primitive object and use; because, if they are to be considered as founded upon other transactions, or to be governed by other principles, they will cease to be according to the usage and custom of merchants, upon which usage and custom alone their validity in the law of England depends; and which is referred to in every declaration in an action upon a bill of exchange; and if the drawer of a bill has a right to elect in this manner the time and place of payment, I think it cannot be competent to any holder of the bill to substitute a new election of his own, and to assent to any variation in these particulars, without the consent of the drawer, either precedent or subsequent. The holder cannot consent to an enlarged time of payment, because, in the interval, the drawee may fail, and he cannot be allowed to enforce the drawer to prolong the credit beyond the period that he himself may have chosen, nor can he consent to abridge the time; because by so doing he will obtain an earlier recourse against the drawer than the drawer intended to give. A bill of exchange is ordinarily ad-

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dressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand the question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be found, in order that the bill may be presented to him for acceptance and payment, and not as a designation of a precise or definite house or place of payment. And, consequently, a general acceptance of the bill leaves the bill according to its original tenor, and does not add any designation of the place of payment. Any introduction, therefore, of a definite and precise place of payment, at which alone the presentment is to be made, is a departure from the generality of the bill; and the holder who consents to take such an acceptance, does, by that act, consent to narrow what the drawer had left at large, and to fix a single place for the demand of that money, which, but for such his act, would be demandable by the drawer, or for his use, anywhere and everywhere. To such a limitation, I humbly conceive that the drawer has a right to object: and, consequently, to say to the holder, that by so doing he has taken the drawee for his own special debtor, in exclusion of the drawer, or, in common speech, he has made the bill his own. I am aware, that upon a refusal to pay at the designated place the acceptor of the bill becomes a debtor generally; but then, in order to enforce that general obligation, either the person who seeks to enforce it must prove the refusal, or at least (and which, in my opinion, is the more correct view of such a case) the party against whom the general obligation is sought to be enforced, may, by way of defence, allege and prove that he was ready with the money at the day and place appointed, and has at all times since been ready with it. I am aware also, that in the case supposed by this third question, which is the case of a bill made payable to a person named therein, the drawer cannot sue the acceptor upon the bill, without averring and proving a presentment for payment by the holder to the acceptor, and a refusal of payment by the latter; and I am sensible, that in many instances it may be a matter of entire indifference to the drawer, whether he shall prove a presentment for payment at the place specially designated by the acceptance, or at the place of abode or usual business of the drawee, to whom he has addressed his bill. But though this may be a matter of indifference in many cases, it

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will not be so in all; if we suppose the drawee to live in some street or square in London or Westminster, and to designate another place of payment in some other street or square, in either of those cities the proof of a presentment at the place designated may be as easy as the proof of a presentment at the place of residence or business: but if we suppose the drawee to live at London, and to designate Salisbury or Exeter as the place of payment, or *vice versâ*, the proof may not be so easy to the drawer, who may have connections in one of those cities, furnishing an opportunity of finding the witness who made the presentment, and no such connections in the other: for there is frequently no sort of connection between the drawer and ultimate holder of a bill; the latter is often a person wholly unknown to the drawer. This difference may be considered generally as varying, and increasing or diminishing, with the distance of the places, though not by that circumstance alone; and if the effect of such a qualified acceptance be made to depend upon the convenience or inconvenience to the drawer in the particular case, a door will be opened to an infinity of questions which cannot be answered but by reference to the distance of the places, accompanied also with an inquiry into the particular circumstances and connections of the drawer in respect of the places. And I apprehend, my Lords, that a rule of law, liable to such questions in practice, ought not to be established without an absolute necessity, especially in mercantile cases, which, above all others, require to be governed by plain, prompt, and easy rules. My opinion, however, upon this question, is founded less upon consideration of particular convenience, than upon the general principle to which I have before alluded; namely, that the drawer has a right to have from the drawee, considered as his debtor in the way that I have mentioned, a general and unqualified acknowledgment of his debt, and promise of payment; and that no assignee of his demand can, without his assent, permit any limit or qualification at the dictation of the drawee, or by consent between those two persons. All that I have thus urged in relation to bills addressed generally to the drawee at his place of abode or business, will, I apprehend, apply with increased force to bills which, by their original form and tenor, require the payment to be made at some particular place designated therein;

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because, in these cases, an acceptance substituting another and different place of payment will be a manifest departure from the declared intention of the drawer. There is another class or form of bills of exchange not noticed in the questions, but to which I advert, because I conceive the considerations belonging to it deserve attention: I mean, bills made payable to the order of the drawer, or which is the same in effect, to the drawer or his order. If a bill so drawn be indorsed to another without value, the indorsee becomes a mere agent of the drawer, and, of course, can never sue him upon the bill. If indorsed for value, either in the first, or any subsequent instance, the rights of the holder against the drawer do not differ from those arising on a bill drawn in favour of a person therein named. But the remedy of the drawer, to whom such a bill may be returned for nonpayment against the acceptor, is, in some respects, different; the drawer of such a bill may, in this event, sue the acceptor by a special declaration, setting forth the indorsement and return of the bill, and thereby entitle himself to recover, in addition to the principal sum, the expense of exchange and re-exchange paid by him to the indorsee, which is the usual mode in the case of foreign bills: and, if he sue in this form, he must allege and prove a presentment and protest for nonpayment. But the drawer may strike out his indorsement, and treat the bill as having remained continually in his own hands unassigned, which is the usual practice in the case of inland bills; and, in such an action, I apprehend it is not necessary to aver or prove a presentment for payment, the bill being accepted generally. I take this to be law; because, in all the numerous actions which have been brought upon bills of this description I have never known a presentment for payment actually proved at the trial: nor the want of such proof, or of the averment, ever made a ground of objection in any stage of the proceedings. In the case of such a bill, therefore, it is obvious, that if the indorsee take an acceptance, qualified as to the place of payment, so as to render the proof of a presentment at that place necessary to the maintenance of an action by the drawer against the acceptor, he will thereby cast an additional burthen upon the drawer, if the latter can be compelled to take up the bill; and I conceive the law will

not allow him to do this. I have expressed my sentiments thus at length upon the third question, because my opinion upon the first and second questions, to which I now revert, depends very mainly upon the opinion which I entertain on the third question.

I consider an acceptance qualified as to the place of payment to be followed by the consequences that I have mentioned, where the holder consents to receive it; and, if I am right in this, then the holder must of necessity have a right to refuse such an acceptance, because he cannot be compelled to take an acceptance which may deprive him of his recourse against the drawer; and this seems to have been the opinion of those learned judges, who, in the decided cases to which your Lordships have been referred, considered an acceptance like the present to be a qualified acceptance. If, then, the holder may refuse such acceptance, or if, consenting to take it, he loses his recourse against the drawer, I must say, I am entirely at a loss to discover how it can have happened, that in no one of the thousands and tens of thousands of bills which have been accepted in this form in England, in the course of the last thirty years, any holder of the bill has ever refused to take such an acceptance, or any drawer contended that he was discharged by the holder's consent to take it. I say, that neither of those things has happened, because I have never heard of them either in or out of a court of justice. Upon this consideration, I am satisfied, that according to the usage and custom of merchants, these words, "payable at, &c." are not understood to furnish a qualification, or to import that the acceptor will cause payment to be made, if the holder will present the bill at the place appointed, but not elsewhere, or otherwise. And I am particularly desirous to seek the meaning of these words in the usage of merchants at the Exchange, rather than in Westminster Hall; because a difference of opinion as to their meaning has for some time prevailed, not only among the judges now present, but also among some of those revered persons who are now no more. I must, however, add, that the words themselves are not apt words of condition or exclusion; and that if their meaning be doubtful, they are to be interpreted most strongly against the person using them, that is, the acceptor; and the most strong inter-

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pretation against him is that which excludes, and not that which admits the qualification. Much was argued by the learned counsel for the plaintiff in error, as to the inconvenience which may ensue from the interpretation which I put upon these words; especially in the case of a gentleman or a lawyer, who should be suddenly called upon for payment at a distant place, after having provided and left funds in the hands of his banker to discharge his acceptance. But this supposed inconvenience appears to me to rest almost wholly in suggestion and imagination. If a bill addressed to a person at his place of abode be accepted generally, I apprehend the holder may, if he will be perverse or foolish enough to do so, take out a writ against the acceptor, as soon as the bill becomes due, without calling at his house for payment, in like manner as any other person may do who is a creditor for goods sold for the ordinary supply of a family; so that the supposed inconvenience is equal in both forms of acceptance, but in practice it can rarely happen in either; because the holder who neglects to present his bill, loses his recourse against the drawer, which no prudent man will choose to do. And, if an acceptance in the form of the present, mentioning a banking-house, is to be deemed a qualified acceptance, I apprehend the same interpretation must be given to the words, if a house of any other description be mentioned, such as the house of any agent or friend, or even the house or place of business of the drawee, if he happen to have two, and the bill be directed to one of them, or if he about to change his place of trade or residence before the bill will become due; or, if the bill be addressed to him at his only place of residence or business, without the addition of his place of abode, as "to A. B. merchant, London." There is also another ground upon which, it seems to me, as at present advised, that I might answer the first question in the negative; and that is this: Admitting a place of payment to be specially designated by the acceptance, I apprehend that the money is nevertheless due generally from the acceptor; and that in an action against him, his readiness to pay at the place appointed should be advanced by him as matter of defence by a special plea averring that fact, and bringing the money into court for the plaintiff's use, as in the common case of a plea of tender,

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(unless indeed he can excuse himself by showing that the money has been lost by the intermediate failure of his banker, which is a point of so much doubt that I hope to be excused from giving an opinion upon it at present); and, according to the ordinary rules of pleading, a plaintiff need not allege any matter the want whereof furnishes a ground of special defence only, and not a general answer to his demand, or general defeasance of his right, unless it be the case of a condition precedent, the effect whereof is to postpone the demand until the matter of the condition be performed; and I have already observed that the words "payable at the house of Sir J. P. and Co." do not appear to me to be proper words of condition. But I hope to be excused from expressing myself with confidence upon this point, by reason of the difficulty there may be in drawing an effectual distinction between the designation of a place of payment in the acceptance, and the designation thereof in the body of the bill itself, or in the body of a promissory note payable upon demand to the bearer, as was the case of *Sanderson v. Bowes*, and one or two others which have been cited; and in which it was decided, that a presentment of the note at the place therein designated was a condition precedent to a right of action for the money. If the like question shall ever arise again, I shall consider it with the utmost deference and respect to the great learning and talents by which those decisions were pronounced, though at present I am not entirely satisfied, that, even in the case of such a note, a readiness to pay at the appointed place is not properly matter of defence alone. It is, I hope, sufficient for me to say at present, that the words of the instrument now in question are not precisely the same, and that they are found in an instrument of a different character, namely, in a bill of exchange; wherein a time certain is appointed for the payment, and of which, as before observed, I think the acceptance must be considered as given in pursuance of an antecedent duty to the drawer, assignable by the custom of merchants, and not as creating a new duty in itself, which, in the case of *Sanderson v. Bowes*, the promissory note was considered to do.

In answer to the fourth question, I am of opinion that an 4th Question.
action could not be maintained under the circumstances therein mentioned; or, rather, that the delivery of the bill by the

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drawer to the payee, such bill still remaining in his hands, or outstanding, would furnish a defence to the action according to the case of *Kearslake v. Morgan**; because, if the drawer could be compelled to pay the original debt under circumstances furnishing a right of action against his drawee, and thereby taking *his* funds out of the hands of the drawee, he might, in the result, be found to pay the amount twice; directly by himself, and indirectly through the medium of his drawee. I shall be understood to speak of a case wherein the holder had consented to take the qualified acceptance. I have clearly intimated that in my opinion he may refuse to do so; and if he does refuse, he may, in my opinion, treat the bill as dishonoured, and sue the drawer upon it.

* 5 T. R. 513.

IN the discussion of the foregoing case three principal questions were made :

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1. Whether the modern theory of law is to rest upon the ancient practice as to the acceptance of bills of exchange, according to which the acceptor was antecedently a debtor, or person having in his hands the funds of the drawer : or whether the extensive practice now established in commerce, of drawing bills, to which the acceptor lends his name and credit for the accommodation of the drawer, has altered the theory of law as it is supposed to have existed formerly ; and accordingly, whether the acceptor becomes a debtor by and upon the terms of his acceptance only, as a contract then first made by him, without reference to any antecedent debt or debts.

2d. What is the true construction of the contract in this particular case :

3. Whether an action of debt will lie upon such contract or acceptance :

The two first questions have been satisfactorily investigated in the proceedings before the House of Lords in this case.

As to the last question, it was touched slightly, but passed without discussion. It is a question, in an abstract view, seemingly of little importance, but as connected with a consideration of the general principles of commercial jurisprudence, as involving a controversy upon the technical rules of pleading, on which the issue of suits, and the fate of suitors, are made to depend, and peculiarly as exhibiting one among many examples of the progressive change of legal opinions, it is a question well deserving a more studious investigation than the opportunities of the editor will afford*.

* This Note was printed three years ago, (Dec. 1820,) at the end of a pamphlet, containing a short report of the case now reported at length. The editor having in that note invited the aid of persons better qualified to discuss the question, the invitation has been accepted, without reference to the previous labours of the editor, by a gentleman who has published "An Analysis of the case of *Rowe v. Young*." At the end of that analysis (sect. 3, p. 64), the author discusses this same question, whether debt will lie upon a bill of exchange. To that discussion the editor refers the Profession, that it may be seen in what manner and degree the original argument is amplified, improved, or varied by a different assortment of the authorities and topics of discussion.

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To form a satisfactory opinion, it is material, in the first place, to consider accurately the early cases upon bills of exchange and promissory notes, and to examine the grounds and reasons of each decision. Upon such a review, it will appear that it is little more than a century since it was the solemn decision of an English Court of Justice, that no person but an actual merchant* could draw a bill of exchange. When this notion was removed by more liberal decisions†, it seems to have been doubted whether an action of debt, or *indebitatus assumpsit*, could lie against any of the parties to, and whether, on the bill or note. Yet in some of the cases it is suggested, that *indebitatus assumpsit* may be maintained on the bill or note as a contract between the privies to it, or in their names, and that the bill or note may be offered in evidence‡. Afterwards it was held in some cases that debt§, in others that *indeb. || assumpsit*, would lie against the maker of a note (or drawer of a bill), where it was expressed to be for value received. But still the great technical objections prevailed as between the drawer or maker, and payee, where value received was not expressed upon the face of the bill or note; and as between all other parties for a supposed want of privity of contract.

At last, when the extension of commerce impressed upon the Courts the necessity of weighing the convenience of mankind against technicalities, which grew out of an obsolete state of society, and rested, but with much inconsistency of decision, upon grounds which no longer existed; when the custom of merchants, which is the foundation and substance of the law of commerce, began to be considered as a branch of the law of nations—a part of the law of England, and, as such, to be

* Lutwyche's Reports, 891, 1585.

† Carth. 82; 2 Ventr. 292; Comberb. 152; 1 Shower, 125; 12 Mod. 336. 380; Salk. 125.

‡ *Brown v. London*, 1 Freeman, 14; *Welch v. Craig*, 1 Mod. 285; 1 Vent. 152; Stra. 680; 8 Mod. 373; Salk. 125; 12 Mod. 37. In many of these early cases it does not appear by or against whom the action is brought.

§ Morgan's Prec. 458; *Rumball v. Ball*, 10 Mod. 38; and *Bishop v. Young*, 2 Bos. & Pul. 78.

|| *Hodges v. Steward*, Skinner, 346; 12 Mod. 345; *Clarke v. Martin*, Lord Raym. 758; 12 Mod. 380; 2 Vent. 292.

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recognized in our courts of justice* ; it was held and decided, without much hesitation, that an action of *indebitatus assumpsit* for money lent†, or for money paid, had, and received, by defendant to the use of plaintiff, might be maintained by the indorsee against the acceptor‡ or the indorser§, and even by the bearer of a lost cash-note, which he fairly purchased, against the giver¶. And, in the cases of bills and notes, that actions of *indebitatus assumpsit* were maintainable although the bills or notes were not expressed to be for value received**, although not a shilling had passed between plaintiff and defendant††, and no evidence was given that the defendant had received value in the case of a bill‡‡.

To ascertain what are the circumstances in which an action of debt may be maintained, what is the definition and rule prescribed by the text-writers, is the second object of inquiry §§.

It is reported in one case to have been held that *indebitatus assumpsit* will lie in no case but where debt lies|||. But the matter is accurately defined in a book of great authority, where ¶¶ it is said, that "debt lies upon every express and implied*** contract to pay a sum certain." A bill of exchange, within the very terms of this definition and rule, is a request and undertaking††† by the drawer; and when accepted, a contract by the acceptor for the payment of a sum certain

* See the argument of Judge Buller, in *Master v. Miller*, 4 Term Rep. 343, and *Pillan v. Mierop*, Burr. Rep.; *Tutlock v. Harris*, 3 T. R. and the several cases of bills drawn payable to the order of fictitious payees. See *Gibson v. Minet*, 1 H. Blac. 569; and *Gibson v. Hunter*, 6. B. P. C. with the note prefixed.

† Lord Raym. 758; 12 Mod. 380; Burr. Rep. 1525; see also 6 T. R. 123; *Kessebower v. Tims*, B. R. Pasch. 22 Geo. 3.

‡ *Tutlock v. Harris*.

** *White v. Ledwick*, Bayley on Bills, 16.

§ *Kessebower v. Tims*.

†† *Ward v. Evans*, 2 Lord Raym. 930.

¶ *Grant v. Vaughan*.

‡‡ *Vere v. Lewis*, 3 T. R. 182.

§§ See this point of the argument discussed in the note to *Eyre v. The Bank of England*, ante, vol. 1, p. 606.

||| *Hard's case*, Salk. 23; and *quare*, Whether the terms of the proposition are not convertible?

¶¶ Com. Dig. tit. Debt, A. 8.

*** Ibid. A. 9.

††† *Collis v. Emett*, H. Black. 321.

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absolutely, in money only * and in specie †. It is a mercantile contract entered into by the acceptor, and not as a mere guarantee. On this ground a distinction is made between the original acceptor of a bill, and a second acceptor, to guarantee the credit of the first, which has been held to be a collateral undertaking that the bill shall be paid, and requires a special declaration ‡.

That the acceptance is an express, or at least an implied, contract by the acceptor, to pay a sum certain, is assumed by all the Judges and the Lord Chancellor in their arguments § upon the case now reported, and may be proved, if requisite, by a multitude of preceding authorities. The question as to privity of contract, or the communication of the rights and benefit of the contract between the original and adopted parties to a bill of exchange, must also depend upon the principles of commercial law, as applicable to instruments of a negotiable nature. It is almost, if not altogether, identical with the question, whether the acceptor incurs an assignable debt by his acceptance, or what is the nature of his contract. In theory, a bill of exchange is an assignment to the payee of a debt due from the acceptor to the drawer. The acceptance imports either that the acceptor is a debtor, or that he holds effects of the drawer ||. Acceptance of a bill imports, and is *prima facie* evidence, that the acceptor has effects of the drawer in his hands ¶; it is an admission of effects. The acceptor by his acceptance gives faith to the bill; and the holder, giving credit to the fact, pays the value on receiving the bill **. Giving a bill is an assignment ††, or appropriation ‡‡ of so much property, which becomes money had and received to the use of the holder.

* *Martin v. Chantry*, Stra. 1275. Bayley on Bills, p. 4.

† Anon. Bull. N. Pri. 172.

‡ *Jackson v. Hudson*, 2 Camp. N. P. C. 44.

§ See the arguments *passim*, and p. 37, the opinion of Wood, B.

|| Dict. of Eyre, C. B. in *Gibson v. Minet*, 1 H. Blac. p. 602. It may be accepted for honour, but the law in that case implies the same obligation.

¶ *Master v. Miller*, 4 T. R. 339.

** Burr. Rep. 1675, (qq.) per Aston, J.

†† *Grant v. Vaughan*, Burr. per Yates, J.

‡‡ *Tallock v. Harris*, 3 T. R. 182.

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The act of drawing a bill implies an undertaking to the payee, and every other person to whom the bill may afterwards be transferred, that the drawee will undertake in writing (or bind himself by a promise) to pay, and will pay, when due, the sum, &c.* The acceptance is evidence in an action by the holder against the acceptor, that he has received value † from the drawer.

Such are the doctrines of law as to the obligation of the acceptor, and the relation between him and the holder considered as payee; doctrines promulgated by judges of various learning, and the highest celebrity in municipal as well as commercial jurisprudence. Upon equal authority is founded the doctrine as to the relation of other parties in a bill of exchange. Every indorser is in contemplation of law a new drawer ‡. And as between indorsee and indorser, though neither of them are actual parties to the original contract, and the whole transaction amounts to no more than money or other consideration passing from the one, and the writing a name by the other, yet this constitutes a mercantile privity, which is recognized by municipal courts, and becomes the foundation of the remedies which they administer in favour of the indorsee against the indorser §, as well as the acceptor and drawer of the bill. The action in such cases may be either upon the bill as negotiable by the custom of merchants, or an *indebitatus assumpsit* (which is in the nature of an action of debt) ||, for money lent, &c., and the bill, with its acceptance or indorsement, may be given in evidence. But essentially, in both cases, the custom of merchants is the true principle of the remedy and foundation of the action. The distinction sounds more in name than in substance ¶. For upon what ground but the custom of merchants can the bill be offered in evidence of money paid as between

* Bayley on Bills, p. 24.

† *Vere v. Lewis*.

‡ *Smallwood v. Vernon*, Stra. Rep. 478; see Bayley on Bills, 47.

§ *Kessebower v. Tims*, *quâ supra*.

|| Vide ante, p. 519, note ||||.

¶ It was upon a question of this kind that Lord Chief Justice Holt fell into a dispute with the mercantile interest in the City, as to the manner of declaring upon a promissory note before the statute of Anne, as upon a specialty by the custom of merchants, which he said was mere obstinacy, as there was so easy a method by *indeb. assumpsit* for money lent. See 2 Lord Raym. 758, and Burr. 1525, post. p. 525.

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indorsee and indorser, or acceptor. If there is other evidence of a consideration, the proof of the bill is superfluous.

How far the rigid maxims of municipal law have bent to the necessities of human intercourse appears by the doctrine, no longer disputed, that a bill of exchange, although it be a mere *chose in action*, yet the common mercantile transfer of it by writing a name, or even by simple delivery, is sufficient to vest the *legal* as well as the equitable interest in the indorsee or deliverer, and entitles him to sue thereon in his own name*.

This principle of decision has been^{*} extended beyond the cases of negotiable instruments. For where a *respondentia* bond had been given, on which the obligee had made a special indorsement to facilitate assignment, upon an action by an assignee of the bond, De Grey, C. J. held, that "the defendant had promised to pay any person who should become entitled to the money;" and there was a verdict for the plaintiff†.

Upon the strength of these authorities an opinion might, perhaps, without presumption, be hazarded; that all the parties, original and derivative, to the negotiable mercantile instrument called a bill of exchange, are equally, by creation or by adoption, parties to the contract which is, expressly as to some, and by implication at least as to all, for the payment of a sum certain.

If so, the circumstances here concur, which, according to the definition‡ of Chief Baron Comyns, are requisite to support an action of debt.

It is indeed stated, in a subsequent head of the Digest, that "debt will not § lie against the acceptor of a bill of exchange." But this doctrine seems to be contradicted by the principle of the rule before stated, and is asserted upon the authority of a case|| which was decided in the infancy of commerce, at a time when it was supposed, and seriously adjudged, that*no person but an actual merchant ¶ could draw a bill of ex-

* See Chitty on Bills, p. 6.

† *Fenner v. Mears*, Black. Rep. 1272. As to the authority of this case, see the observations of Lord Kenyon, in *Johnson v. Collings*, 1 East, 98.

‡ Com. Dig. *quà sup*.

§ *Id. ibid.* B.

|| Anon. Hardres, 485.

¶ Lutw. 891, 1585.

change—when it was held, that the bill must import to be for value received; that *indebitatus assumpsit* would not lie against the acceptor, and that the acceptor was liable only as a surety, and not as a principal debtor.

The revolution which has now^{*} taken place in judicial opinions, and the liberal doctrines upon this subject, which are now become settled principles of law, and applied daily in practice, seem to confirm the supposition, that there is, according to the law-merchant, which is a part of the law of England, an implied privity of contract between all the parties to a bill, primitive and derivative, or adoptive^{*}.

In all cases of the transfer of negotiable instruments the question seems to be, whether the instrument itself is not by the law-merchant *primâ facie* or presumptive evidence of a consideration passing from hand to hand as the bill passes, but liable to be rebutted by evidence on the general issue, or special plea, that the holder gave no consideration.

An abstract of some of the principal cases cited in the foregoing note are here subjoined, with observations upon some later authorities which appear to bear upon the question of privity.

In *Anon. Hardr. 485*, held, that the payee cannot maintain debt against the acceptor, and it was said in that case, that the promises of the acceptor no more create a *duty* than a promise by a stranger to pay, &c. if the creditor will forbear. Upon the clear distinction between the acceptor of a bill, and a mere guarantee, see *Jackson v. Hudson*, 2 Camp. 447.

In *Welch v. Craig*, Stra. 680. 8 Mod. 373, held, that debt will not lie upon a note. But it does not appear who was the defendant in the action.

In *Morgan's Precedents*, 458, is an entry of a declaration in debt by administratrix of payee of note against the maker.

In *Rumball v. Ball*, 10 Mod. 38, action of debt brought on a note, by payee against maker, and held good.

In *Brown v. London*, 1 Freeman, 14; 1 Mod. 285; 1 Ventr. 152, held that *indeb. assumpsit* would not lie against the acceptor of a bill; but Twisden, J. doubted. The ground of this decision is

* See *Simmons v. Parminster*, 1 Wils. 185; Co. Litt. 172.

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said in Lev. 298, to have been, because the custom was not set out in the count.

In Skinner, 346, it is said that *indeb. assumpsit* (or debt, *qu.*) will only lie against the drawer upon a bill importing to have been given for value received.

In Salk. 23, it was held that *indeb. assumpsit* will lie in no case but where debt lies: That *indeb. assumpsit* (and therefore, *semb. debt* *) lies against the drawer, though not against the acceptor, of a bill of exchange. The reason for this decision is given in Skinner, 346, namely, "for the apparent consideration." See *Vere v. Lewis, infra.*

In Salk. 125, and 12 Mod. 37, it is given as general doctrine, that *indeb. ass.* will not lie on a bill of exchange, as it is said, "for want of consideration, as it is but evidence of a promise to pay, which is but a *nudum pactum.*" But it is to be observed, that the action was by the indorsee against the drawer, and in the last resolution of the judges, as given both in Salkeld and 12 Mod. it is said, that "the action should have been special on the bill, or a general *indeb. ass.* for money received to his (the indorsee's) use. See *Carten v. Palmer*, 12 Mod. 380, a case before the statute of Anne, where, upon a motion in arrest of judgment, a declaration upon a note on the custom, &c. as if it had been a bill, was held bad. But Holt, C. J. said, it might have been taken as evidence of money lent. In *Nicholson v. Sedgwick*, *Ld. Raym.* 180, the action (and verdict for plaintiff) being upon a note payable to bearer, the judgment was arrested on the ground of want of privity; but it was said the plaintiff might have maintained the action in the name of the payee, or if it had been payable to order, the (immediate) indorsee might have brought an action against the maker. And it was said to have been resolved in *Hodges v. Steward*, that the indorsement to the bearer binds the party who immediately indorses to him. In 12 Mod. 345, it is held that the first indorser (payee) striking out the names of all the indorsees of a bill, purporting to have been for value received, may maintain *indeb. assumpsit* against the drawer. In that action, Holt, C. J. is reported to have said, the action will lie, for the bill was given as a security for money lent, and without

* Vide ante, p. 519, note ||||.

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doubt it was a debt; and the court, it is said, resolved it was a plain debt, and that one might bring debt, or indeb. ass. upon a bill of exchange, because it is in the nature of a security.

In 12 Mod. 380; and in Burr. Rep. 1525, it is laid down as indisputable, that indeb. ass. for money lent will lie upon a note. See also *Smith v. Kendall*, 6 T. R. 123. In *Clerke v. Martin*, Ld. Raym. 758, the action being upon a note payable to plaintiff or order; one count of the declaration was upon indeb. ass. for money lent, and another upon the custom, as on a bill of exchange. The defendant pleaded non assumpsit, and the jury gave a general verdict for the plaintiff with entire damages. Upon motion in arrest of judgment, Holt, C. J. was "*totis viribus* against the action." He said, "that such actions were innovations upon the common-law:" That "it was a new sort of specialty invented in Lombard-street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes on the custom of merchants proceeded from obstinacy, as he had expressed his opinion against them, and since there was so easy a method, as to declare upon a general indeb. ass. for money lent. But as the damages were given generally, it could not be intended that they were given on the count of indeb. ass." And judgment was accordingly arrested.

So in *Gibbs v. Vaughan*, Burr. 1516, it was held that an action for money had and received may be maintained by the bearer against the giver of a cash-note upon a bank, made payable "to ship Fortune, or bearer."

In *Tatlock v. Harris*, 3 T. R. 174, the indorsee of a bill recovered against the acceptor upon counts for money had and received, and money paid.

In *Vere v. Lewis*, 3 T. R. 182, the indorsee of a bill recovered upon the money-counts against the acceptor, although there was no evidence that he had received value for the bill. The Court said *the acceptance was evidence that he had received value from the drawers.*

In *Kessebower v. Tims*, B. R. Pasch. 22 G. 3, it was held that the indorsee of a note might maintain indeb. ass. for money lent against the indorser.

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In *Bishop v. Young*, 2 B. & P. 78, (a decision by the present Lord Chancellor, when C. J. of the C. P.) an action of debt by the payee against the maker of a promissory note, expressed to be for value received, was upon demurrer held maintainable. What the decision might have been as between other parties, the Chief Justice said he would not express.

The case of *Barlow v. Bishop*, 1 East, 432, has been supposed (Chitty, 470,) to establish a rule, that the plaintiff can in no case recover under the money counts, unless money has actually been received by the party sued, and for the use of the plaintiff. But in that case the plaintiff had received the note by indorsement from a married woman, and he had therefore no title or interest in the note; which could be no evidence for him of any thing.

If, (as Lord Kenyon observed in that case,) the indorsement had "been in the name of the husband, it might have been *"available"* as a note indorsed, or as evidence of a consideration to the maker. But the indorsement being in her own name (as the Judge observed) "it was impossible to say that she could pass away the interest of her husband by it;" or, (it might be added,) that the plaintiff could make use of that which belonged to another, as evidence of a demand made by him against the defendant, who might have been sued a second time upon the same demand by the husband, when he had recovered possession of the note. It is indeed observed by the C. J. as reported at the end of the case, "that the plaintiff could not recover on the money counts, as no money passed between the parties." But if the maker of a negotiable note incurs the same responsibility to the holder as the acceptor of a bill, *quære*, how this extrajudicial dictum is reconcileable with the decision in *Vere v. Lewis*, ante, p. 525?

In *Waynum v. Bend*, 1 Camp. 174, the action was by an indorsee against the maker of a promissory note, made payable to *T. or bearer*. An indorsement being stated in the declaration. Lord Ellenborough said, that though unnecessary, yet as an indorsement was stated in the count, on the note, it must be proved; and that the plaintiff could not recover on the money-counts, as he was not an original party

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to the bill, and there was no evidence of any value received by the defendant from him; but a witness being afterwards found to prove the indorsement, there was a verdict for the plaintiff on the count on the note. This case, it must be observed, contains no more than a *dictum* at *nisi prius*, and that the note was made payable to bearer; in which case the courts, as in actions brought upon bankers' cheques and cash-notes, for obvious reasons, and upon the same principle, require proof of a consideration paid by the holder. At the end of the case of *Waynam v. Bend*, three authorities, on the point in question, are cited in a note subjoined by the reporter; *Johnson v. Collings*, 1 East, 98; *Whitewell v. Bennett*, 3 B. & P. 559; *Houle v. Baxter*, 3 East, 177; but without any remarks upon the case, or the application of the authorities.

In *Johnson v. Collings* the decision was, that a promise to accept a bill before it was drawn was not in law an acceptance. And as it could not support the count on the acceptance of the bill, so being no acceptance it could be no evidence in support of the general counts for money had, &c. Lord Kenyon merely said, as to the other counts, that there was no evidence to support them.

In *Whitewell v. Bennett*, the bill produced in evidence varied from that stated in the declaration. A banker's check had been given for the amount by the acceptor to the payee post dated, for the purpose of preventing the receipt of the money, until it should be ascertained, whether a bill of the drawer, in the hands of the acceptor, would be paid. The presumption of law in support of the money-counts arising from the acceptance of the bill, was rebutted by the circumstance of post dating the check, by a conversation which took place at the time of the acceptance, and other circumstances; and it was expressly found by the verdict that the defendant, at the time when he accepted the bill, had no effects in his hands.

In *Houle v. Baxter*, 3 East, 177, a bill being made payable to the order of the drawer, and indorsed by him, the plaintiff, in order to give additional credit to the bill, without the privity of the defendant, the acceptor, indorsed it upon the request of the drawer, and re-delivered it to him. The defendant having become bankrupt before the bill became due, and the plaintiff being obliged to pay the amount to the in-

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dorsee, the Court held, that he was *not a surety*, because he incurred no liability at the request of the defendant, and as his demand was upon the bill, which he might have proved under the commission, it was discharged by the certificate. The question turned wholly upon the nature of the collateral contract upon the bill itself, whether considered as a mercantile instrument, or as evidence of money paid and received. If the plaintiff could have been considered as a party to the instrument, according to the custom of the merchants, the demand was barred by the certificate.

Since the decision of this case on appeal, an act has been passed (1 & 2 Geo. IV. c. 78), reciting, that the practice and understanding among merchants was contrary to this decision; and enacting, that an acceptance made payable at a banker's, without further expression, shall be deemed a general acceptance; but if it is expressed to be payable at a banker's, or other place *only*, that it shall be deemed a qualified acceptance, and the acceptor shall not be liable to pay the bill, except in default of payment on demand at the banker's or other place.

SCOTLAND.

AN APPEAL FROM COURT OF SESSION.

CRAIGDALLIE AND OTHERS - *Appellants.*AIKMAN AND OTHERS - *Respondents.*

In the year 1736, a meeting-house was built by contributions of materials, money and labour, and collections at the church door, of persons professing the principles of those who seceded at that time from the Church of Scotland. The meeting-house, and the ground on which it was built, were vested in certain persons, as trustees for the use of the society, and managers of the house of public worship for the Associate Congregation of Perth.

A schism took place in 1796 among the members of this religious community, and several of the members, including the representatives of some of the trustees, to whom the legal right of property had devolved, separated themselves from the rest of the community, and absolved themselves from the authority of the Associate Synod, which was the constituted authority for the government of the community. This separation took place on grounds of alleged difference of opinion, on a question as to the power of the civil magistrates in religious concerns, which the Court of Session pronounced to be unintelligible.

Held, that in a case where it was difficult to ascertain who were the legal owners, as representatives of the contributors, the use of the meeting-house belongs to those who adhere to the religious principles of those by whom it was erected; and those who had separated themselves from the Associate Synod, and declined their jurisdiction, were held to have forfeited their right to the property: although it had been judicially declared that there was no intelligible difference of opinion between them and the adherents of the Synod.

THE question in this case arose upon a dispute between the members of a congregation of seceders

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from the church of Scotland, respecting the right to the use of a meeting-house, built by contribution soon after the time of the secession, (1731,) on a piece of ground which was disposed to certain persons, who declared that they held the ground, and buildings to be erected, in trust for the use of the Society and Managers of the house of public worship, for the Associate Congregation of Perth. This was one of the bodies which seceded from the church of Scotland, in 1731, upon the question of patronage or appointment to vacant churches. The Seceders generally, and this congregation in particular, adhered to the doctrines and discipline of the church of Scotland. These consisted of the confession of faith, the larger and shorter catechisms, certain propositions respecting church government, the ordination of ministers, and the directory of worship, which had been agreed upon by the assembly of divines, at Westminster, soon after the revolution of 1688, approved of by the general assembly of the church of Scotland, and established by the fifth act of the second session of the first parliament of William and Mary. The church government then established was, by Kirk session*, presbyteries, synods, and

* Originally, by stat. 1597. By act 1606 Episcopacy was restored; Presbytery again 1638; Episcopacy again 1662; and, finally, Presbytery by stat. 1689. The Kirk Session is composed of the clergyman of the parish, and of certain persons called elders, selected from the congregation of each parish, and ordained by a clergyman. This is the lowest court in the church, having jurisdiction in spiritual matters only over its own parish.

▲ Presbytery is composed of the clergymen of a district, together with one elder from each of the Kirk Sessions within that district. This is the court next above the Kirk Session,

general assemblies, all which, except the last, were preserved by the Seceders.

In the confession of faith annexed to this act, one of the articles is in the following words: "The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty to take order, that unity and peace be preserved in the church; that the truth of God be kept pure and entire; that all blasphemies and heresies be suppressed; all corruptions and abuses in worship and discipline prevented or reformed; and all the ordinances of God duly settled, administered, and observed: for the better effecting whereof, he hath power to call synods, to be present at them, and provide that whatsoever is transacted in them be according to the mind of God."

The national covenant of Scotland, and the solemn league and covenant of the three nations, which had been adopted by the first assembly of the church, were adopted also by the Seceders. These, as the standard principles of religious doctrine and discipline in their church, were recognized by the Seceders in their "act, declaration and testimony for the

exercising jurisdiction over the district from which the members are selected.

A Synod is formed by the union of a certain number of Presbyteries, over which its jurisdiction extends.

The General Assembly is composed of representatives from all the different Presbyteries, from the Universities and the Royal Burghs. This is the supreme ecclesiastical court. Its power extends over the whole kingdom in all ecclesiastical subjects, and there is no appeal against its judgments.

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“ doctrine, worship, discipline and government of
 “ the church of Scotland, issued at Perth in the
 “ year 1736 ;” and by a formula or series of inter-
 rogatories, which were proposed to persons desirous
 to become members of the church of the Seceders,
 and to which their assent was required. By the
 second question of the formula, the candidate for
 admission was interrogated, ~~as~~ whether he sincerely
 “ owned and believed the whole doctrines contained
 “ in the confession of faith ?” The fourth question
 “ was in these words: Do you acknowledge the per-
 “ petual obligation of the national covenant of Scot-
 “ land, particularly as explained in 1638, to abjure
 “ prelacy, and the five articles of Perth, and of the
 “ solemn league and covenant ? And do you ac-
 “ knowledge that public covenanting is a moral duty
 “ under the New Testament dispensation, to be per-
 “ formed, when God, in his providence, calls for it ?”

In the year 1795, upon the petition of a member
 of the Associate Synod, a committee was appointed to
 review the questions in the formula, and to bring
 in an overture (the heads of an act) for uniting the
 members in their sentiments, respecting the power
 ascribed in the confession of faith to the civil magi-
 strate in matters of religion, and respecting the
 nature of the obligation of the national covenants
 upon posterity ; in the mean time, allowing presby-
 teries to exercise forbearance as to licence and ordina-
 tion, with respect to the articles in question. After
 a report had been made by the committee, proposing
 an act of forbearance, and various meetings and
 discussions upon the subject, that measure was
 abandoned.

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At a meeting of the session, on the 13th of April 1797, a petition, on behalf of those who maintained the principles of the appellants, was presented against any alteration in the substance of the formula; but assenting, for the sake of peace, to prefatory explanation, as the following passage in the petition imports.

“ At the same time, as certain expressions in the said formula, or in other ecclesiastical standards, and our national covenants, have been understood by some as favouring perscution for conscience sake, and ascribing an exorbitant power of religious interference to the civil magistrate; we are far from wishing the synod to request, from any candidate, his licence or ordination, or approbation of any such principles of which we disapprove; and, as there is a diversity of opinion anent the obligation of our covenants, national and solemn league, we consider them as binding on posterity only, so far as these covenants respect a solemn engagement of adherence unto all the truths and ordinances of the Lord Jesus Christ, as contained in our confession and catechisms. If the prefixing an explanation of this nature to the old formula would satisfy our brethren, who object to said formula, we will agree thereto.”

At a meeting of the synod, in April 1797, a resolution passed by a majority of voices, adopting the following preamble (as an explanation) to the formula: “ Whereas some parts of the standard books of this synod have been interpreted as favouring compulsory measures in religion, the synod hereby declare, that they do not require an approbation of any such principle, from any candidate for

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“licence or ordination : And whereas a controversy
 “ has arisen among us respecting the nature and
 “ kind of the obligation of our solemn covenants on
 “ posterity, whether it be entirely of the same kind
 “ upon us as upon our ancestors, who swore them ;
 “ the synod hereby declare, that while they hold the
 “ obligation of our covenants upon posterity, they
 “ do not interfere with that controversy which hath
 “ arisen respecting the nature and kind of it, and
 “ recommend to all the members to suppress that
 “ controversy, as tending to gender strife rather than
 “ godly edifying.”

Against the adoption of this preamble various petitions were presented to the synod, which, having been considered and rejected, the measure was finally approved, and the preamble retained, by a resolution of the synod in 1799.

This resolution was followed by a protest and declinature on the part of several ministers. In one of these, after reciting the points in dispute, his opinions upon the subject, and the measures adopted by the majority of the synod, the minister, “ in his
 “ own name, and in the name of all the members of
 “ the congregation who should adhere to him, pro-
 “ tests against the proceedings of the synod, relative
 “ to, &c. and, until the preamble should be removed,
 “ declines the authority and jurisdiction of the as-
 “ sociated burgher synod, and of all presbyteries
 “ subordinate to it,” &c.

In consequence of this protest and declinature, the synod declared the minister, protesting, to be no longer a member of their body, and excluded him from the pulpit of their meeting-house, where he

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had been accustomed to preach. Hereupon a complaint was preferred to the sheriff, and afterwards an action was brought in the court of session by the appellants, “to have it declared, that the meeting-house, &c. belonged to them, &c. as adhering to “the original principles of the secession, and whose “ancestors contributed to the purchase,” &c. A counter-action was raised by the respondents, to have it declared that the parties (protesting and declining the jurisdiction of the synod) had lost all interest in the subjects. These actions being conjoined, the court, by an interlocutor, dated the 1st of February 1804, found, “that the property of the subjects in “question is held in trust for a society of persons “who contributed their money, either by specific “subscriptions, or by contribution at the church “doors, for purchasing the ground, and building, “repairing, and upholding the house or houses “thereon, or of paying off the debt contracted for “these purposes, *such persons always by themselves, “or along with others, joining with them, forming “a congregation of Christians continuing in communion with and subject to the ecclesiastical discipline of a body of dissenting protestants, calling themselves ‘the Associate Presbytery and Synod of Burgher Seceders;’* and remit to the lord “ordinary to proceed accordingly.”

Against this judgment an appeal was presented to the House of Lords, which was argued in the year 1813, when, after a long hearing: The Lords, by their judgment, found, “as matter of fact, sufficiently established by proof, that the ground and buildings in “question, were purchased and erected with intent

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“ that the same should be used and enjoyed for the
 “ purpose of religious worship, by a number of persons
 “ agreeing at the time in their religious opinions and
 “ persuasions, and therefore intending to continue in
 “ communion with each other ; and that the society
 “ of such persons acceded to a body, termed in the
 “ pleadings, ‘ The Associate Synod ;’ and find, that
 “ it does not expressly appear as matter of fact, for
 “ what purpose it was intended at the time such
 “ purchase and erections were made, or at the time
 “ such accession took place, that the ground and
 “ buildings should be used and enjoyed, in case the
 “ whole body of persons using and enjoying the
 “ same should change their religious principles and
 “ persuasions ; or, if in consequence of the adherence
 “ of some such persons to their original religious
 “ principles and persuasions, and the non-adherence
 “ of others of them thereto, such persons should
 “ cease to agree in their original principles and per-
 “ suasions, and should cease to continue in commu-
 “ nion with each other, and should cease, either as to
 “ the whole body, or as to any part of the members
 “ composing the same, to adhere to the body, termed
 “ in the pleadings, ‘ The Associate Synod ;’ and it
 “ is therefore ordered and adjudged, that, with these
 “ findings, the cause be remitted back to the Court of
 “ Session in Scotland, to review all the interlocutors
 “ complained of in the said appeal ; and upon such
 “ review, to do therein what shall appear to them to
 “ be meet and just.”

In prosecution of this judgment, the appellants
 presented a petition to the First Division of the Court
 of Session, praying them to apply the remit ; and

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after some steps of procedure, unnecessary to be here detailed, having appointed the appellants to give in a condescendence, stating the facts and circumstances they might consider necessary to be investigated, with a view to the application of the remit, a condescendence was accordingly lodged ; and that being followed by answers, replies, and duplies, the Court, on advising the whole cause, pronounced the following interlocutor :

“ The Lords having resumed consideration of this petition, with condescendence, answers, replies, duplies, and whole cause, find, that the pursuers, James Craigdallie and others, have failed to condescend upon any acts done, or opinions professed by the associate synod, or by the defenders, Jedidiah Aikman and others, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the said defenders have deviated from the original principles and standards of the associate presbytery and synod. Farther find, that the pursuers have failed in rendering intelligible to the Court, on what ground it is that they aver, that there does at this moment exist any *real* difference between their principles and those of the defenders ; for the Lords further find, that the act of forbearance, as it is termed, on which the pursuers found, as proving the apostacy of the defenders from the original principles of the secession, and the new formula, were never adopted by the defenders, but were either rejected or dismissed as inexpedient ; and that the preamble to the formula, which was adopted by the associate synod in the

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the Court of
Session ap-
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“ year 1797, is substantially and almost *verbatim*
 “ the same, as the explication which the pursuers
 “ proposed in their petition of the 13th April 1797,
 “ to be prefixed to the formula; and to which,
 “ if it would have satisfied their brethren, they
 “ declared that they were willing to agree; there-
 “ fore, on the whole, find it to be unnecessary
 “ now to enter into any of the inquiries ordered by
 “ the House of Lords, under the supposition, that
 “ the defenders had departed from the original
 “ standards and principles of the association, and that
 “ the pursuers must be considered merely as so many
 “ individuals, who have thought proper voluntarily to
 “ separate themselves from the congregation to which
 “ they belonged, without any assignable cause, and
 “ without any fault on the part of the defenders,
 “ and, therefore, have no right to disturb the de-
 “ fenders in the possession of the place of worship
 “ originally built for the profession of principles
 “ from which the pursuers have not shown that the
 “ defenders have deviated; therefore, sustain the
 “ defences, and assolzie; and in the counter-action
 “ of declarator, at the instance of the defenders
 “ Jedidiah Aikman and others, decern and declare
 “ in terms of the libel; but find no expences due to
 “ either party.”

The appellants, conceiving themselves to be ag-
 grievied by this interlocutor, again appealed to the
 House of Lords.

19th July,
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The *Lord Chancellor*—There is a cause which
 has been repeatedly before the House, and one of the
 most difficult and distressing which I ever met with;

I mean the cause of *Craigdallie v. Aikman*. This arose in a controversy, which seems to have very much engaged the feelings of the different parties. The question was, who were entitled to the use of a chapel, which had been built, partly by previous subscription, partly by money received at the doors of the chapel after it was built, and partly by money subscribed in several different ways? The history of the case may be stated without going at great length into the transactions. There having been a secession from the established church of Scotland, a question arose between these parties, who are seceders, whether this chapel, which had been erected for the use of one particular class of seceders from the established church, belonged to the one party or the other? And this suit was instituted for the purpose of having it determined, to whom the property in this chapel belonged, or rather who were to have the use of it; because the origin of the chapel, and the manner in which it was purchased, left it one of the most difficult things in the world to determine where the property vested.

When this matter was formerly before the House, we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel, we should hold the building appropriated to the use of persons who adhere to the same religious principles; and in that view, it became necessary to determine whether any, and if so, which of the persons, who were contending for the use of this place of worship, adhered to or had ceased to adhere to those which were originally the religious principles which led to the establishment of this place of worship, with a view to deter-

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mine what was to be done if the right principle was to appropriate the building to those who continued to hold those religious principles, and were in communion with those who did so. By the judgment of the House in 1813, it is found that the ground and buildings in question were purchased and erected, with intent that the same should be used and employed for the purposes of religious worship, by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other; and that the society of such persons acceded to a body, termed in the pleadings “the Associate Synod:” That it does not expressly appear as matter of fact, for what purposes it was intended, at the time such purchase and erections were made, or at the time such accession took place, that the said ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions; or if, in consequence of the adherence of some of such persons to their original religious principles and persuasions, and the non-adherence of others of them thereto, such persons should cease to agree in their religious principles and persuasions, and should cease to continue in communion with each other, and should cease either as the whole body, or as to any part of the members composing the same, to adhere to the body termed in the pleadings, “the Associate Synod.” By this judgment it was intended, that the congregation originally, if I may so represent them, were persons who adhered to the doctrines of what is known in Scotland by the name of the Associate Synod. This place for

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religious worship being built by the contributions of a great many persons, adhering to the doctrines of the Associate Synod. If the whole body of those who now frequent the place, no longer adhered to the doctrines held by the Associate Synod, then it became a question for whom, at present, this building should be held in trust, which was purchased by money originally subscribed by those who held the opinion of that synod. The question then would be, whether any of the members now desiring to have the use of this place of religious worship, could be considered as entitled to the use of a building purchased by persons adhering to those religious opinions? And supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be, which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the *cestui que trusts* of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it.

I cannot read this judgment of the House without your perceiving, that the House felt infinite difficulty how to proceed with a case so very singularly circumstanced as this was; but, however, it was remitted to the Court of Session: and being remitted to the Court of Session, the appellants presented a petition to the First Division of the Court, praying their Lordships to review the interlocutors having

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regard to the proceedings of this House; and in the mean time, to find that the petitioners, and those who adhered to them, should have exclusive possession of the meeting-house in question; or, at all events, to find that they were entitled to possession for the forenoon, and for the afternoon and evening of each Sunday, alternately; or to grant to the petitioners such other relief in the premises as the Court should think fit. The Court, however, found itself under the same difficulty as this House, in order to know what it should decree; and accordingly, they appointed the appellants to lodge a condescendence of such facts and circumstances as appeared to them right to be ascertained, in order to the application of the remit from the House of Lords.

The appellants accordingly gave in a condescendence, which was followed by different pleadings; and in those pleadings it was maintained, that a certain preamble, which has been very much heard of in the course of the cause, was in perfect harmony with the original, and the strictest principles of the association; and that, at all events, it was originally proposed by the appellants themselves, and was ultimately adopted merely in consequence of their zeal in its behalf.

The Court pronounced an interlocutor*, in which it describes the utter impossibility of seeing any thing like what was intelligible in the proceeding; and I do not know how this House is to relieve the

* The Lord Chancellor read the interlocutor, which is printed ante, p. 537.

parties from the consequence. The Court of Session, in Scotland, were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland, as any of your Lordships; and are as well, if not better than your Lordships, able to decide whether any acts done, or opinions professed by the defenders, Jedidiah Aikman and others, were opinions and facts which were a deviation, on the part of the defenders, from the principles and standards of the Associate Presbytery and Synod. If they were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all under the words, "as far as they are capable of understanding the subject;" I hope I may be permitted, without offence to you, to say that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand the matter than we are; but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have, or have not, deviated from them; and I have made the attempt to understand it, till I find it, at least, on my part to be quite hopeless.

The questions, therefore, in this case are, whether the interlocutors by which the defences are sustained, and these parties assoilzied, are right? And, to be sure, if they cannot show that the defenders, or any of them, had departed from the original standard and principles of their association, and if the Court is satisfied that the pursuers have not departed from these principles, but have thought proper, volun-

CASES IN THE HOUSE OF LORDS,

tarily, to separate from the congregation to which they belonged, the inquiries directed by the judgment of the House would be altogether unnecessary; for the inquiries directed by that judgment aimed at having it ascertained, whether the defenders and pursuers, or either, and if so, which of them, had departed from the original principles of the congregation? and according to what the Court of Session now tell us, they cannot find out, nor has either party enabled them to find out, that either the one or the other had departed from the original principles of their association; and the consequence of that is, that those who have not attended the meeting, but who are yet insisting that they have interests in the property in which the meeting is held, are to be considered as persons voluntarily separating themselves from the congregation without cause; and all I can say upon the subject is, that after racking my mind again and again upon the subject, I really do not know what more to make of it.

On the other part of the interlocutor I entertain a doubt, namely, upon that part of it whereby, “in the counter-action of declarator, at the instance of the defenders Aikman and others, they discern and declare in terms of the libel;” in which terms, among other things prayed, are, that those defenders may forfeit all their interest in the property. Now I can conceive that, consistently with the declaration contained in this interlocutor, there being no difference of religious opinion among those persons, as far as the Court of Session could understand the subject, that it might be right to discern in the terms of the libel; namely, that those who are now engaged in

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the worship, according to these religious opinions and religious principles, the same in the judgment of the Court of Session should not be disturbed in that religious worship; but I doubt extremely, whether, on the other hand, if the parties had interest, I mean interest in the lands and buildings, you can go further than to say, that they shall permit the religious worship to proceed as it has hitherto proceeded; and that they shall not make use of the interest they have in the land and buildings to prevent that. But it would be going a great way to say, that because they have for the present separated from the rest of the congregation, and although this very interlocutor finds there is no difference of opinion between them, that you should take out of them, if they have in them, any interest in the lands and buildings, &c. You may direct that land and those buildings to be enjoyed for the purposes to which they were originally devoted; but if they have any interest in the land and buildings, I doubt very much the propriety of a declaration, that they have forfeited that interest. That does not appear to me at this moment necessary to make good the effect of the interlocutor; but I will take it into further consideration till Friday.

The Lord Chancellor.—In that case of Craigdallie and Aikman, there was one point which I reserved in some measure for further consideration; but in looking through the case again, my opinion is, that I shall act most properly in advising you to affirm that judgment generally.

Friday, 21st
July.

Judgment affirmed.

SCOTLAND.

COURT OF SESSION.

(First Division.)

ALEXANDER M'DONALD

Appellant.

ALEXANDER ROSS AND OTHERS

Respondents.

ARMY Agents having distinct accounts with the Colonel and the Paymaster of a regiment, upon the assurance of the Paymaster that he was authorized by the Colonel, and on his account, to provide certain articles for the regiment, transfer to the debit of the Colonel a sum standing in their books, originally debited to the Paymaster; and having settled accounts, and received the balance due from the Paymaster, sue the Colonel for the balance claimed as due from him, including the sum upon the debit transferred. Pending this action the Paymaster, on the requisition of the Agents, furnishes them with a letter from the Colonel, as the authority for the charge against him. The Agents being fully satisfied as to the meaning and extent of this authority, in the course of their pleadings maintain, strenuously, the right of the Paymaster to act under it; and judgment, in the first instance, is given in their favour. After they had obtained this judgment, apprehending the possibility that it might be reversed, they retransfer the sum in dispute from the debit of the Colonel to the debit of the Paymaster, giving him notice of that fact, and of the proceedings in and state of the action against the Colonel. The former judgment, on representation, was reversed; and it was held, by the Court below, and the House of Lords on Appeal, that the Agents were entitled in an action of relief against the Paymaster, to recover the sum in dispute, and the costs of the action against the Colonel.

If an action is brought for the benefit and through the intervention of another, he is bound to bear the costs of the action.

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ON the 14th of August 1794, Alexander M'Donell of Glengary, being authorized by government to raise a regiment of Highland fencible infantry, appointed the Respondents Ross and Ogilvie agents for the regiment. The appellant was about the same time appointed paymaster, of which Glengary apprised the respondents Ross and Ogilvie by a letter, dated in August 1794, by which he also directed them "to honour all drafts which might be drawn by the appellant as paymaster, and to pay no attention to the drafts of any other person, nor to issue money to them." This letter was mislaid, and not produced in the cause.

The regiment was not completed and embodied till May 1795; and during the intermediate period the Appellant, as paymaster, drew bills upon Ross and Ogilvie, as agents, to a large amount, for the use of the regiment, without specifying the different heads of service to which these drafts were to be applied. After the regiment was embodied the appellant was continued as paymaster, and went on as before, drawing generally on account of the regiment, without specifying the different heads of service for which he drew; the drafts in the mean time stood at his debit in their books, he being entitled to a counter credit when the particular distributions should be rendered.

The money issued by government on account of a regiment, consists of, first, the levy money for recruits; secondly, the pay and subsistence to officers and men; thirdly, contingent money for incidental expenses, such as stationery, removing

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baggage, &c. ; and, lastly, money for furnishing regular clothing and accoutrements.

The levy money is issued to the agents, and is drawn *for by the colonel*, or any person whose drafts on that account he authorizes to be answered. In the letter of service the levy money to be allowed is specified, and a general letter of instructions accompanies it, directing a part to be retained from each recruit, for providing slop clothing and necessities. This is done by the officer who enlists him. He generally does so, by obtaining the articles from the regimental store, and paying for it out of the retained bounty. With the original furnishing, or subsequently replacing of these necessaries, the colonel has no concern.

The pay and subsistence of the men is also issued to the agents, and drawn from them *by the paymaster*. The colonel has no power to draw for this money.

The contingent accounts, in like manner, are to be drawn for monthly by the paymaster ; the commanding officer certifying that the account is correctly stated.

The money issued for the regular clothing and accoutrements is termed the off-reckonings. It amounts to more than is absolutely necessary for that purpose, and forms part of the emoluments of the colonel: it is the property of the colonel alone; and the paymaster-general will not pay any part of this money without an assignment of it from the colonel. When the assignment is in favour of the agents, as is usually the case, a separate

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account is opened for it, termed the Clothing Account.

This fund is kept separate for the colonel ; it is not paid into his personal account for pay and subsistence ; and no person can draw upon it without express power from him to do so.

Army agents are bound to honour all drafts made by the paymaster in that capacity. These drafts are always in advance, and to account generally, without specifying the particular service to which the sums so drawn are to be applied. The drafts are placed to the debit of the paymaster until their accounts or distributions are transmitted, when the different articles are classed under their proper heads.

During the whole period of the appellant's continuing paymaster, the agents were in advance above the sums they received from government. Of these advances they complained to the paymaster, and requested him to send particular accounts of the application of the money. The paymaster, however, was not able to make out complete accounts of the different sums he had expended for the regiment ; and matters continued in this state, the agents being constantly in advance for the regiment, till 1796, when the appellant resigned his situation as paymaster, and the colonel soon after resigned his commission. The agency of the regiment was transferred by the succeeding colonel from Ross and Ogilvie to M'Donald, Bruce, & Co. on the 25th of December 1796. Immediately upon this change the appellant called upon the agents, to have his accounts adjusted, and exhibited to them the sub-

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joined Supplementary Distribution, or Account of Necessaries*, alleged to have been disbursed by him for the regiment during the year 1795, the balance amounting to 686*l.* 6*s.* 1½*d.* in payment of which

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* Account of Necessaries provided for the Glengary Regiment by Captain M'Donald, Paymaster :

Art.	1795.		£.	s.	d.
1.	April 24.	To cash paid Mr. Graham, for false tails	-	1	16 -
2.	May 18.	To d° paid Duncan M'Alister, for 70 pair shoes, at 4 <i>s.</i> 6 <i>d.</i>	-	15	15 6
3.	June 17.	To d° paid Mutus, for stocks, cockades, and drummers caps	-	16	11 6
4.	20.	To d° paid Mr. M'Lean, for plaids	-	4	19 -½
5.		To d° for 461½ yards linen, at 1 <i>s.</i> 3 <i>d.</i> per yard	£. 28	17	2½
6.		To d° for 12½ yds. cambric, at 3 <i>s.</i> 9 <i>d.</i>	2	6	10½
7.		To d° for 20 yds. drab cloth for watch coats, at 2 <i>s.</i> 4 <i>d.</i>	-	2	6 8
8.		To d° for 380 yards blue cloth for d°, at 2 <i>s.</i>	-	30	16 -
9.		To d° for 92 yds. green baize, at 1 4	6	2	8
10.		To d° for 63 yds. green linen, at 1 1	3	8	3
11.		To d° for 3 yds. blue thread, at 2 6	-	7	6
12.		To d° for ½ yard wham, at - 6 6	-	3	3
13.		To d° for 4 grs. of buttons, at 5 6	1	2	-
14.		To d° paid Wilson, hair-dresser, for false tails	-	75	1 5½
15.		To d° for 17 pair of shoes, at 4 <i>s.</i> 6 <i>d.</i>	-	1	17 -
16.		To d° paid d°, for 2 dozen serjeants bonnets, at 16 <i>s.</i>	-	3	16 6
17.		To d° paid d° 50½ doz. privates d°, 14 <i>s.</i>	35	7	-
18.		To d° paid carriage for d°	-	5	-
19.		To d° paid for 50 dz. pair of shoes, 5 <i>s.</i>	127	10	-
20.		To d° paid for 43½ doz. stocks, at 15 <i>s.</i>	32	12	6
21.		To d° paid 44 dozen cockades to d°, at 5 <i>s.</i>	-	11	-
22.		To d° paid Mr. Ascoli, for feathers	-	45	12 6
23.		To d° paid Mr. Stevens, for 20½ dozen brushes, for the use of the regiment	-	56	10 3
24.		To d° paid Mr. Campbell, Glasgow, for cockades and rosettes	-	4	10 -
			-	9	7 6

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he said he had applied the different sums drawn from the agents.

He required them to give him credit for this sum, and state it to the debit of the colonel, because it consisted of furnishings of that description, which the colonel was bound to furnish his regiment with from the fund called the *off-reckonings*, allotted by government for that purpose; and the appellant stated to them, that he had express orders from the colonel to pay all such accounts. The agents con-

Art.	1795.		£.	s.	d.
25.	June 20.	To 1 pattern serjeant's shirt, 6s.; and 6 privates d ^o , 4 s. 2 d.	-	1	11 -
26.		To making ten watch coats, at 2 s. 6 d.	-	1	5 -
27.		To paid Urquhart, for false tails, combs, razors, &c.	-	47	10 -
28.		To paid bill Mr. William Shairp for plaids and tartan	-	51	10 -
29.		To cash paid Russell's account for shoes at Irvine	-	5	17 -
30.		To 4 pieces of garters given the quartermaster, for the use of the regiment	-	-	8 -
31.	Oct. 19.	To amount paid for shoes	-	14	- -
32.		To amount paid Wormald, Fountaine, & Co. for 8 pieces drab fearnoughts, 224 yards, at 3 s. 4 d. per yard, for watch coats	-	37	6 8
33.		To 2 pieces drab serge, at 4 s. per yard	-	4	- -
34.		To 14 yards white cloth, at 6 s. 6 d.	-	4	11 -
35.		To 5 bonnets given the quartermaster for the band	-	-	6 8
36.	Nov. 14.	To 248 yards linen, at 1 s. 4 d.	-	16	10 8
37.		To 6 shirts ready made, at 6 s. 4 d.	-	1	13 -
38.		To pairs of gaiters, per invoice, account remitted	-	12	9 10
39.		To 630 turn-screws and gun-worms, brushes and prickers	-	23	12 6
40.		To 250 privs bonnets, at 1 s. 3¼ d.	£. 34	4	-
41.		To 32 serjeants d ^o , at 1 s. 6 d.	-	2	8 -
42.		To carriage of d ^o	-	1	8 -
			38		
43		To insurance on 610 l. for clothing, &c. per account, dated March 11, 1796	-	13	13 8

sequently allowed this sum as an article of credit to the appellant, and charged it against the colonel. But when a copy of the colonel's account was presented to his agent, an objection was made to the charge of 686*l.* 6*s.* 1½*d.* upon the ground that the articles of which it was composed were not necessary for the regiment, and *had been bought without authority from the colonel.*

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Art. 1795.		£. s. d.		
44.	May 4.	To freight and carriage from London of 11 bales and a box, to G. Hamilton & Co. per account	-	6 2 -
45.	June 4.	To cartage of 11 bales tartan from Bannockburn	-	5 12 6
46.		To 2 carts from Glasgow to Irvine, per M'Nab	-	1 9 -
47.		To 9 extra carts from Kilmarnock to Carlisle, 105 miles, at 6 <i>d.</i>	-	23 12 6
48.		To 9 d° from Carlisle to Brampton 10 miles, at 4½ <i>d.</i>	-	1 13 9
49.		To 9 d° from Brampton to Haltichistle, 12 miles, at 4½ <i>d.</i>	-	2 - 6
50.		To 9 d° from Haltichistle to Hexham, 15 miles, at 4½ <i>d.</i>	-	2 10 7½
51.		To 13 d° from Hexham to Newcastle, 21 miles, at 4½ <i>d.</i>	-	5 2 4½
			48	3 3
Sum			£. 721	13 5½
Cr.				
1795.	By allowance for watch coats, from 8th May to 24th December 1795			- 21 10 4½
	By d° - d° from 25th Dec. 1795 to June 1796			13 17 -
Balance, Captain M'Donald			35	7 4½
Remains			£. 686	6 1½

(signed) A. M'Donald, Paymaster.

N. B. If the allowance for watch coats from the 14th August to the 8th May is allowed by government, of course it will be put to the credit of this account.

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This objection the agents communicated by letter to the appellant, who, in his answer to them, stated, “ that he had Glengary’s order (a copy of which he “ would send them whenever he got his papers from “ Edinburgh) for whatever had been furnished, and “ requested them to make no alteration in their ac- “ counts.”

In consequence of this communication with the appellant, the account in question was allowed to remain as it stood debited to the colonel, upon the presumption that the orders which the appellant had stated he held for furnishing these articles would be forthcoming, and would be obligatory upon the colonel. After placing this sum to the colonel’s debit, the appellant made an arrangement with Ross and Ogilvie for the balance of his account ; who, after again writing to the appellant to request that he would send them the order alluded to by him as a voucher for the charge against Glengary, raised an action against Glengary, for the payment of the balance of his account, including, *inter alia*, the amount of the necessaries already mentioned. In defence, Glengary stated, that this particular sum had been debited to him without proper authority, and that he was therefore not bound to pay it.

Upon this defence, Ross and Ogilvie again wrote to the appellant in these terms : “ Your charge of “ 686*l.* 6*s.* 1 $\frac{1}{4}$ *d.* for necessaries furnished the Glen- “ gary Fencibles, being disputed by Mr. Alexander “ M’Donell of Glengary, we request you will have “ the goodness to transmit to Mr. Anderson, W.S. “ Edinburgh, *the original instructions given you “ by Glengary*, or any other document in your

“possession, which may support any part of the
“same.”

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In consequence of this communication, the letter of instructions was produced by the appellant, and exhibited in the process against Glengary,—it is as follows :

“Dear Sir, 29th May 1795.

“As I am about to leave this quarter for the
“North, in my absence it may save you further
“trouble to have these instructions to show, when
“you see it proper. You will be particular in your
“advancing money to officers, not exceed five gui-
“neas, as bounty, for each man brought and passed
“at the inspection, according to orders, in regard to
“appearance ; and you will also, previous to the
“settling of their accounts, require to have the men
“paraded as furnished by each officer, and let those
“serjeants who were employed to recruit for me, as
“well as the Reverend Alexander M'Dowell, be
“there present, so as to establish their claims, and
“prevent future disputes. You will also be so good
“as to subsist the supernumerary serjeants of my
“appointment till vacancies occur, so as to relieve
“me of that burden. And I hereby beg of you to
“settle with the different men enlisted by me, or on
“my account by those so employed. As also, I au-
“thorize you to settle my private accounts, properly
“vouched, that may appear against me ; as likewise
“those things ordered by my sister Miss M'Donell.
“You will also please to *settle what appears proper*
“*to you in regard to the clothing* and other ap-
“pointments of the regiment. I have moreover to
“request of you to get all accounts for or against

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“ me drawn up, whether between us, or between me
 “ and any other, in regard to my military transac-
 “ tions, or transactions whatever, subsequent to our
 “ first concerns; and, by attending to all these things
 “ with all possible convenient dispatch, you will in-
 “ finitely oblige,

“ Dear sir,

“ Yours, &c. (signed) “ *A. M'Donell.*

Ross and Ogilvie considering this letter a sufficient authority to the appellant to furnish the necessities in question, on the 8th of June 1802, proceeded with their action against Glengary.

In the course of the action against Glengary the respondents presented a petition, in which the following passage occurs:

“ Glengary apprised Ross and Ogilvie of the pay-
 “ master's appointment, by a letter, dated August
 “ 1794 (which has unfortunately fallen aside), and
 “ directed them to honour *all* drafts which might be
 “ drawn by him the paymaster, and to pay no atten-
 “ tion to the drafts of any other persons, or to issue
 “ money to them. The paymaster was not merely
 “ empowered to draw the pay and usual allowances
 “ of the regiment, but was also authorized, as has
 “ been admitted by the defender (M'Donell of
 “ Glengary) to uplift the levy money, the allowance
 “ for haversacks, and a variety of other allowances,
 “ with which, as paymaster, he had nothing to do.
 “ He was likewise empowered to draw the pay and
 “ allowances due to the colonel himself—a power
 “ which is seldom or never entrusted to the pay-
 “ master—and with these discharge the private ac-
 “ counts of Glengary. In short, this paymaster

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“ acted as sole manager of the colonel, in all trans-
“ actions relating to the regiment, whether falling
“ within his own province or not ; and during the
“ experience of half a century, Ross and Ogilvie
“ have never known an instance of such unlimited
“ trust and confidence being placed in any per-
“ son in a similar situation.” In another part of
their pleadings they express themselves as follows :
“ Glengary was desirous to shake himself loose, if
“ possible, from his obligation to repay to the agents
“ the money they had advanced the paymaster by
“ his instruction, and upon his responsibility, and
“ which had been applied to the use of the regiment.
“ He did not pretend either that the money was not
“ actually advanced by the agents, or that it had not
“ been applied to the use of the regiment, but he
“ insisted that the agents had no right to make the
“ advances to the paymaster without his authority ;
“ his object was, to have the paymaster to deal with
“ instead of Ross and Ogilvie ; in which case he
“ would have set against the advances the balance
“ which he pretended to be due to him by the pay-
“ master on his own private account. In this way
“ he wished to roll over the agents upon the pay-
“ master, when demanding payment of a sum admit-
“ tedly advanced and applied to the use of the regi-
“ ment, which was advanced solely on his responsi-
“ bility, and for which he was at any rate liable, as
“ colonel of the regiment. It was a matter of in-
“ difference to Ross and Ogilvie which of the two
“ paid the advances they had made. Had they con-
“ sidered both equally liable, they would have pre-
“ ferred coming against the paymaster, who was

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“equally able to pay with the colonel, and whom
 “they always found more willing to settle his ac-
 “counts; but they considered the colonel as the
 “party primarily liable to them, and they did not
 “wish to lend themselves to a scheme which they
 “conceived to be unjust, by refusing to give to the
 “paymaster the credit to which he was entitled.”

Lord Hermand, ordinary, pronounced judgment in their favour; but in consequence of some doubts which had arisen, in a letter, dated on the 6th of July 1806, and addressed to the appellant, Ross and Ogilvie apprised the appellant “*that they had re-
 “charged to his account the sum of 686l. 6s. 1¼d.
 “for clothing disbursements, until allowed to them
 “by the Court of Session.*”

On the 9th of July 1808, after reconsidering the case, Lord Hermand pronounced an interlocutor, sustaining the claim of Ross and Ogilvie. Against this interlocutor Glengary put in a representation; in which he asserted: 1st, That the furnishings comprising the account in question, neither were necessary for the regiment, nor were made by the appellant; and 2dly, That Ross and Ogilvie had not made any advance for payment of the necessities, but had merely transferred the account in question from the debit of the appellant to Mr. M'Donell's debit, upon finding that the appellant was their debtor to the extent of 2,000*l.*

15-Dec. 1808. The Lord Ordinary thereupon appointed Ross and Ogilvie to explain “at what time, whether it
 “was while they continued agents for the Glengary
 “regiment, or after the agency was transferred to
 “another house, that they placed the account of

“ 686*l.* 6*s.* 1½*d.* now pursued for, to the repre-
 “ senter’s debit. As also, whether they actually
 “ paid that account in any other way than by placing
 “ it to the credit of the paymaster.”

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In the answer to this representation, Ross and Ogilvie stated to the Lord Ordinary, that owing to the great embarrassment and confusion into which their bankruptcy had thrown their affairs, their agent had not been able to get sufficient information within the short space limited for giving in the answers, to enable them to reply pointedly to the interrogatories put by the Lord Ordinary. Ross and Ogilvie endeavoured to show that these new averments made by Glengary were not only altogether unfounded, but were contradicted by his former admissions in the cause. Upon advising the representation, with answers, the Lord Ordinary pronounced an interlocutor, by which he found, “ That prior to the 1 March 1809.
 “ regulations 1798, as stated in other cases, which
 “ have occurred subsequent to the interlocutor re-
 “ presented against, paymasters were appointed by
 “ the colonel, or by the field officers and captains
 “ jointly, though in the circumstances of this case
 “ it is immaterial in which of these ways the pay-
 “ master of the Glengary regiment may have been
 “ appointed: Finds, that in so far as concerns the
 “ business of the regiment, no extraordinary powers
 “ were conferred on Lyndale, the original paymaster,
 “ by the letter of the 29th May 1795, relating chiefly
 “ to the settlement of accounts already contracted,
 “ nor any thing more than would have been implied
 “ from the nature of his office, and in particular that
 “ it did not empower him to draw upon the respon-

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“ dents for the expense of alleged furnishings out
“ of the off-reckonings, a construction confirmed by
“ the conduct of Lyndale himself, who cannot be
“ presumed to have lain out of so large a sum as
“ 686*l.* 6*s.* 1*d.* sterling, the amount of the account
“ objected to, as well as by the conduct of the pur-
“ suers, who, while they continued agents for the
“ regiment, did not state that account to the debit
“ of the representer : Finds it stated by the repre-
“ senter, and not denied, that Lyndale was removed
“ from the office of paymaster in June 1796, and
“ that in July thereafter, the representer resigned
“ the regiment ; after which the new colonel trans-
“ ferred the agency from the pursuers to M'Donald,
“ Bruce, & Co. London : Finds it instructed by the
“ books of the respondents, that the account in
“ question was not paid on or before the 30th Sep-
“ tember 1796, seeing that account is not stated in
“ the account rendered upon that day : Finds that
“ by the deliverance on the representation, the re-
“ spondents were directed to say explicitly at what
“ time, whether it was while they continued agents
“ for the Glengary regiment, or after the agency was
“ transferred to another house, that they placed the
“ account of 686*l.* 6*s.* 1*d.* now pursued for, to the
“ respondents' debit ; as also, whether they actually
“ paid that account in any other way than by placing
“ it to the credit of the paymaster : Finds that no
“ direct answer has been made to these plain ques-
“ tions, which are evaded on the ground of the want
“ of information from the respondents themselves,
“ or their agents in London, whence it was to be in-
“ ferred that no safe answer could be given : Finds

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“ that the account 686*l.* 6*s.* 1*d.* was not placed to
 “ the representer’s debit till after the respondents
 “ had been deprived of their agency, as well as that
 “ said account was not actually paid, but merely by
 “ an operation on the books transferred to the credit
 “ of the paymaster : Finds that the representer can-
 “ not be affected by such irregular transfer, alters
 “ the interlocutor represented against, sustains the
 “ defences so far as respects said account, and de-
 “ cerns, reserving to the respondents to state what
 “ balance, exclusive of said account, if any, be due
 “ to them.”

Against this interlocutor the respondents Ross and Ogilvie prepared a representation, and at the same time raised an action of relief against the appellant, in which they concluded that the defender should be decerned to repeat and pay back to the pursuers the foresaid sum of 686*l.* 6*s.* 1½*d.* with interest thereof since the same was credited to him, and also that he should be ordained to make payment to the pursuers of “ the expenses of the for-
 “ said action presently depending against the said
 “ Alexander M'Donell of Glengary, and which
 “ hitherto have been wholly incurred in discussing
 “ objections to payment of the foresaid sum,” and of the expenses of this action.

This action being brought into Court, various orders were made upon the defender to put in defences.

In the mean time Lord Hermand, in the action May 13, 1812.
 against Glengary, refused the representation for the respondents, and adhered to his former interlocutor.

The respondents prepared a petition against these June 24, 1812.

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judgments of the Lord Ordinary, and at the same time they lodged a minute in the process against the appellant, in which, after mentioning the procedure in the process with Glengary, they state, "that, as Lord Hermand had adhered to his interlocutor before mentioned, upon advising a full representation and answers, a petition against his Lordship's judgment had been prepared and lodged yesterday, and will probably be under the consideration of the court to-morrow. A copy of that petition was herewith produced, that the defender in this action might see that the pursuers have done every thing in their power to make the claim against Glengary effectual, and might satisfy himself that the argument was properly stated; and, as it is unquestionable that, if the pursuers shall ultimately fail in recovering this sum from Glengary, the defender must make repetition to them of the foresaid account, credited to him on the faith that it was a proper charge against Glengary, he may hold himself in readiness to make repetition, or to take such steps to substantiate his charge against Glengary as he may think advisable." Lord Armadale, ordinary, allowed this minute to be seen.

The petition for the respondents in the other action having been appointed to be answered, answers were given in for Glengary accordingly. Upon this the respondents lodged another minute in the process against the appellant, stating, "That, upon the 23d October last, the agent for the pursuers had sent to the agent for the defender a copy of the answers which had been given in for Glengary to the said petition; but that, in order to prevent

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“ the possibility of the defender’s pleading ignorance
 “ of the proceedings in the original action, and that
 “ he might be prepared to obviate any statements in
 “ these answers which he judged erroneous; the pur-
 “ suers now produced in process a printed copy of
 “ the answers for Glengary, and intimated to the
 “ defender that the case stood in the short roll
 “ of the First Division for determination upon the
 “ 2d of December.”

The Lords of the First Division, upon advising the petition for the respondents, with answers, adhered to the Lord Ordinary’s interlocutor, and found the respondents liable in expenses; whereupon the respondents enrolled the action, against which the present is an appeal, to ask decree against the defender.

The appellant gave in defences to the following effect :

“ First, The defender does not conceive that
 “ Messrs. Ross and Ogilvie have any claim against
 “ him for advances made on account of the regiment
 “ raised by Glengary, as they were made to him in
 “ the capacity of paymaster and agent for Glengary.

“ Secondly, Messrs. Ross and Ogilvie, by hav-
 “ ing mislaid the letter of credit lodged with them
 “ by Glengary in August 1794, lost their recourse
 “ on Glengary: by this their neglect the defend-
 “ ant ought not to suffer.

“ Thirdly, If Messrs. Ross and Ogilvie had dis-
 “ allowed the articles in the defender’s account
 “ when it was claimed, he would have recovered
 “ the money from the regiment, which he cannot
 “ now do.

“ Fourthly, This claim is prescribed.”

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Dec. 19, 1812.

When the case was debated before the Lord Ordinary, he pronounced an interlocutor, by which, in respect of the contingency between this action and the original action, still in dependence before the First Division of the Court, he made avizandum with the cause to the Lords of that division; and gave directions that the case might be reported.

The case was accordingly reported, and the following judgment was pronounced :

May 14, 1813.

“ Upon report of the Lord President, and having
“ advised the mutual informations of the parties, the
“ Lords repel the defences, find the defender liable
“ in terms of the conclusions of the libel, and decern,
“ find expenses due, and allow an account thereof
“ to be given in, and remit to the auditor to tax the
“ same, and to report.”

The appellant preferred a reclaiming petition against the interlocutor above recited; but it was refused without answers.

Against this interlocutor the appeal was presented.

For the Appellants, *Mr. Charles Warren, Mr. Robert Grant.*

For the Respondents, *Mr. Scarlett, Mr. West*.*

July 19, 1820.

The *Lord Chancellor*:—This case involves two questions; the first is, Whether, under the circumstances of the case, Mr. M'Donald was liable to pay Messrs. Ross and Ogilvie the amount of money demanded by their summons? The next question is, Whether, supposing the Court of Session to have been right in awarding payment by him of that sum,

* Now Sir Edward West, Chief Justice of Bombay.

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they ought to have charged him with the expenses of the antecedent proceeding, by which the now respondents sought to charge with that debt M'Donell of Glengary?

When it was argued at the bar, it appeared to me proper in this case, attending to all the circumstances of it, that we should have time to consider it. I had more doubt with respect to the point, whether this appellant ought to have been charged with the expenses of the antecedent proceeding, than on the question, whether he should be charged with the sum of six hundred and odd pounds; but on looking at it again and again, I offer it to you as my opinion, that the decision of the Court of Session is right on both points. In the first place, I think the appellant is chargeable in the account, under the circumstances here stated, at the suit of these respondents; and looking at the whole nature of the proceeding in the action that was brought against Glengary, as a principal, it appears to me that is fairly to be considered as an action for the benefit and behoof, and in a great measure through their intervention, the action of Mr. M'Donald himself, and that therefore he ought to pay the costs of that action. The consequence of that is, that on moving, according to the forms of this House, for a reversal of this judgment, for my own part I must say, Non-content, meaning thereby that the judgment should be affirmed, but without costs.

Judgment affirmed.

COURT OF CHANCERY, IRELAND.

BY ORIGINAL APPEAL.

MARIA RYLANDS and RICHARD } *Appellants*;
FRANKLIN GOUGH - - - }

The Right honourable DAVID LA- }
TOUCHE, PETER LATOUCHE the } *Respondents*;
elder, ROBERT LATOUCHE, and }
JOHN LATOUCHE, Esqrs. - }

BY REVIVOR AND AMENDMENT.

MARIA RYLANDS, RICHARD FRANK- } *Appellants*;
LIN GOUGH, and JOHN FRANKLIN }

PETER LATOUCHE, and ROBERT LA- }
TOUCHE, and GEORGE LATOUCHE, } *Respondents*.
JOHN DAVID LATOUCHE, and }
PETER LATOUCHE the younger, }
Esqrs. - - - - - }

A suit having been instituted by a devisor and revived by a party as devisee, whose supposed right is displaced by the discovery of a later will, the cause cannot be continued for the benefit of the effective devisee, by agreement between that devisee and the plaintiff in the suit, so as to enable the devisee under the second will (not being a party to the suit) to appeal against the decree; and an appeal cause cannot be heard before the Court of Appeal until he is made a party in the suit below.

In such a case, where the suit had been originally instituted by the devisor, and upon his death revived by the party claiming under the first will, *semb.* that the proper course to be adopted by the devisee under the second, is not (as in this case) to file a supplemental bill, praying to have the benefit of the proceedings in the revived suit, but to revive, *de novo*, the suit as abated on the death of the devisor.

The case is different where a decree is defective only because incidental parties are not before the Court; as in the case of an assignment in trust for payment of debts, reserving the surplus if the assignee obtains a decree, and afterwards it appears that he had assigned his interest before the decree, his assignees may, by supplemental bill, have the benefit of that decree. (*Semb. Binks v. Binks*, note p. 593.)

A decree for redemption and general account, &c. having been made in the original and revived causes in favour of the supposed devisee, it cannot be restricted in the supplemental suit to an account to be taken as between the executors and mortgagees, &c. to the time of the death of the deviser, dismissing the bill as it regards the interest of the devisee; for the devisee is a necessary party to the account.

The devisee having taken the benefit of an insolvent act, and made the assignee a party to the suit, who, by his answer, disclaimed all knowledge of the assignment, and refused to undertake the trust for the creditors, he cannot be compelled to act, and the suit remains imperfect until another assignee is appointed and made a party.

A decree made in such a state of the cause is erroneous.

* IN and before the year 1803, Thomas Gough, the father of the appellant Maria Rylands, was seised and possessed of lands which he held for lives under John Latouche as head landlord. At the same date John, David and Peter Latouche, carried on business as bankers, and being creditors of Gough upon a bill of exchange, brought an action against him, and obtained possession of the lands under a custodiam, which was granted to *David Latouche. The custodiam proving unproductive, a mortgage

* This case is reported chiefly as an example of the ordinary course and issue of Irish appeals in the appellate jurisdiction; but some of the questions discussed, and points decided of pleading and practice, are not unworthy of attention.

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of the lands was executed by Thomas Gough to David Latouche, as trustee for the other partners, but without prejudice to the custodiam; and finally, after various transactions not material to the issue of this cause, the lands were sold by Gough to John Latouche, under alleged circumstances of fraud, duress, and oppression.

On the 8th of November 1803, Thomas Gough filed a bill in the Court of Chancery in Ireland against David, John, and Peter Latouche, stating several transactions of debt, outlawry, mortgage, and sale, (as before in part set forth), impeaching the sale for fraud, and praying that the respondents might account for the rents and profits of the lands, and that he might be restored to the possession on the usual terms of redemption.

The defendants by their answer, insisted on the fairness of the transactions, and the validity of the sale.

Gough died pending the cause, in November 1804, leaving a will dated the 19th of August 1804, by which he devised property, including the lands in question, to John Hamilton and William Crawford, in trust for the appellant Maria, then a minor, and appointed Hamilton and Crawford his executors. Hamilton and Crawford proved the will, and with the appellant Maria, by her testamentary guardians, revived the suit, which afterwards by order, made on her attaining twenty-one, was carried on in her own name.

After the reviving of the suit, it was discovered that Gough had made another will, dated 30th of September 1804, by which he devised all his estates

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to the appellant Richard Franklin Gough, charged with some legacies, and amongst others a legacy to the appellant Maria, and appointed the appellant Richard Franklin Gough residuary devisee and legatee.

The second will was established under a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, who thereupon agreed with Maria Rylands and Hamilton and Crawford, that the suit which had been revived by them as above stated, should be continued in their names for the benefit of the appellant Richard Franklin Gough.

The cause was prosecuted accordingly, and the plaintiffs and defendants respectively having examined witnesses on the questions at issue, the cause was heard before Lord Chancellor Ponsonby on the pleadings and proofs; and on the 28th of June 1806, it was decreed, that under the circumstances of the case the deed of sale dated the 1st of August 1786, ought to be deemed fraudulent and void as against the plaintiffs in the cause; and accordingly, that the same should be brought in and cancelled, and that the plaintiffs should be entitled to a redemption of the mortgage of the 25th of October 1783, on payment of the balance (if any) which should appear to be due on the foot of the same; and that it should be referred to a master to take an account of the sums due to the defendants, David, John, and Peter Latouche, on the foot of the mortgage; and also, an account of all sums advanced by the defendants, or any of them, as well in the discharge of the debts of Thomas Gough, as also of the sums paid to him or for his use, and

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by his desire, in his lifetime ; and that the master should also take an account of what the defendants, or any of them, had received, or without their wilful default might have received, out of the mortgaged premises, from the 9th of July 1781, being the time when they entered into possession thereof under the custodiam ; and that the rent reserved by any lease, which should appear to have been *bonâ fide* made by the defendants, should be charged from the date thereof, and that the master should set a fair rent on the other parts of the premises ; and that in taking the accounts, the master should set off the sums with which the defendants should be chargeable, first in discharging the interest, and next the principal of their demands ; and thereupon should strike a balance, and the costs and further directions were reserved until the return of the master's report.

The cause was afterwards re-heard before Lord Chancellor Ponsonby, on the petition of John Latouche ; and on the 29th of April 1807, it was ordered that the former decree should be affirmed.

By the report on the 23d of December 1807, the master upon the whole of the accounts found that there was a balance of 6,286 *l.* 17 *s.* 1 *d.* due to the plaintiffs on the day of his report. Against this report several exceptions were taken by the defendants, on the ground that the master, in taking the accounts, had not received certain statements copied and signed by Gough as evidence against the plaintiffs. On this ground most of the exceptions were allowed, and upon reference back to the master to review his report according to rules made on hearing the exceptions, he found by his amended report,

By order, 23
March, 1808.

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that after all credits and allowances there was a balance due to the defendants of 4,755 *l.* 4 *s.* 9 *d.* Against this amended report both plaintiffs and defendants filed exceptions, which were over-ruled by decree on further directions, on the 27th of June 1808, whereby it was ordered that the balance found due by the amended report should be paid with interest in three months, and thereupon possession of the lands, with the title deeds, be given to the plaintiffs, and in default of payment the bill to be dismissed. This sum, according to the decree, was paid by R. F. Gough.

Hamilton and Crawford died after the date of this decree, leaving the appellant Maria the only plaintiff on the record. John Latouche also died after the decree and before the appeal, leaving Robert Latouche his heir at law, and Robert and John Latouche his executors. In January 1812, Robert and John Latouche appealed against the decrees of June 1806, and April 1807, but withdrew their appeal in March 1812. Maria Rylands (together with R. F. Gough) appealed against the order of the 23d of March 1808, and the decree of the 27th of June 1808.

After the appeal was presented, the cause abated by the death of the respondent David Latouche, and was revived against the respondents George Latouche, John David Latouche, and Peter Latouche the younger, who were exëcutors, and obtained probate of the will of David Latouche.

On the 20th of May 1818, the appeal was called on for hearing, and on the statement of the appellant's counsel, (no counsel appearing for the respond-

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ents,) the House were of opinion that the appellant, Richard Franklin Gough, ought to have been made a party to the suit in Ireland, which could not, by agreement, be carried on for his benefit, and on this ground adjourned the appeal *sine die*; directing by their order, that the appellants should be at liberty to take such proceedings in the Court of Chancery in Ireland as they might be advised, to make the proper persons parties to the cause there, and to bring all proper parties before the House.

After the decree had been made which established the last will of Thomas Gough, the appellants Richard Franklin Gough, and John Franklin, who had been appointed executors, obtained probate of that will from the Court of Prerogative in Ireland.

The appellant, Richard Franklin Gough, afterwards took the benefit of an Act passed in the fifty-third year of the reign of Geo. 3, "for the relief of Insolvent Debtors in Ireland."

On the 7th of November 1818, the appellant, Richard Franklin Gough, exhibited a bill in the Court of Chancery in Ireland against the respondents, and against Henrietta Gough the surviving executrix of the first will of Thomas Gough, (the three other executors, namely, John Hamilton, William Crawford and George Lloyd being dead,) and against John Franklin, his co-executor under the second will, and Maria Rylands, and against John Massy, who was chosen assignee of his estate and effects under the said insolvent act: praying among other things, that Richard Franklin Gough and John Franklin might have the benefit of the suit instituted by Thomas Gough, and revived by John

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Hamilton, William Crawford, George Lloyd, Henrietta Gough and Maria Rylands, and of all proceedings, orders and decrees in the original and revived suit, so that Richard Franklin Gough might be entitled to appeal therefrom.

The respondents put in a demurrer to the bill, which, on argument, was over-ruled by the Master of the Rolls; but other causes of demurrer, which were assigned *ore tenus*, having been allowed, the appellant Richard Franklin Gough appealed from this decision to the Lord Chancellor, who reversed the order of the Master of the Rolls.

On the 6th of April 1819, the respondent Robert Latouche filed his answer to this bill, and thereby contended that the appellant Richard Franklin Gough ought not to have the benefit of the decrees made in the revived cause, and that any right, or beneficial interest, which the appellant Richard Franklin Gough had in the cause, and the subject-matter thereof, were legally vested in John Massy.

On the 8th of April 1819, the defendant John Latouche answered the bill.

On the 24th of April 1819, the other respondents, Peter Latouche the elder, George Latouche, John David Latouche, and Peter Latouche the younger, answered the bill; and they as well as John Latouche, by their answers, raised the same objections as the respondent Robert Latouche had done to the relief sought by the bill of Richard Franklin Gough.

The several other parties, defendants, also answered the bill, and the defendant John Massy by his answer stated, that he was appointed assignee of the appellant Richard Franklin Gough's estate and

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effects, without his knowledge, consent, or concurrence ; that he never accepted the trust, nor acted under it ; that he did not intend to undertake, and was desirous to be released from the trust.

The cause was afterwards set down on the bill and answers, and was heard before the Lord Chancellor on the 4th and 5th days of May 1819; and on the 10th of May it was decreed, " That as between
 " the plaintiff and the defendants Robert Latouche,
 " John Latouche, Peter Latouche the elder, George
 " Latouche, John David Latouche, and Peter La-
 " touche, the younger, the plaintiff *as executor* of
 " Thomas Gough, be, and he accordingly is hereby
 " decreed, entitled to the benefit of the proceedings
 " in the pleadings mentioned, as prayed by his bill.
 " And it is further ordered, that as between the
 " said plaintiff and said defendants, the remainder
 " of plaintiff's bill, claiming *as devisee* of said
 " Thomas Gough, be, and the same is hereby dis-
 " missed with costs, to be taxed by the master in
 " this cause, against the plaintiff, and as to the de-
 " fendant John Massy, assignee of Richard Franklin
 " Gough, an insolvent in the pleadings named,"
 it is further ordered, " that the plaintiff's bill in this
 " cause, and all and every the matters and things
 " therein contained, be, and the same are hereby
 " dismissed, with costs, to be taxed by the master
 " against the plaintiff."

On the 24th June 1819, it was ordered by the House on the petition of the appellants, that they should be at liberty to amend their original appeal, by making the appellant John Franklin a party appellant, which was accordingly done.

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The respondent John Latouche, one of the executors of the will of John Latouche the elder, died after the decree, leaving the respondent, Robert Latouche, surviving executor.

Under these circumstances, the appeal was again brought to hearing before the House in the year 1820.

For the Appellants, *Mr. Horne, Mr. Blake.**

For the Respondents, *Mr. Hart, Mr. Wetherell.†*

Lord Redesdale :—This is a decree giving the benefit of the former decree to the plaintiff in his character of executor, which was an immaterial part of that decree. Substantially, it related to the interest claimed by the plaintiff in that suit as devisee; and the bill is dismissed as to the devisee, in whose absence the account cannot be taken.

The Lord Chancellor :—The decree in the original suit was made upon the bill, and in favour of Maria Rylands. If she is not entitled to that decree, how can another person in a supplemental suit, professing to carry on the former suit, have the benefit of such a decree?

Lord Redesdale :—The fact that Gough was insolvent and discharged by act of parliament, could not have been known to Lord Ponsonby. The decree dismissing the bill as to the right of the devisee, extinguishes the whole right of the appellant, and yet is not made a substantive ground of appeal.

* Since appointed Deputy Remembrancer of the Court of Exchequer in Ireland.

† Since appointed Solicitor-general.

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This proceeding, looking to its origin, is on the appeal of Maria Rylands. In the original appeal Richard Franklin Gough was made an appellant, although he had nothing to do with the cause. For the purpose of making him appellant, it was then supposed that Maria Rylands had no interest. The House ought, on the former hearing, to have dismissed the appeal, without prejudice to any suit to be instituted by Richard Franklin Gough.

To the parties as executors the Court could only give the benefit of the decree in favour of Thomas Gough, so far as the account of receipts and payments to the time of his death extended.

Subsequent to the death of Thomas Gough his devisee became the party entitled, and as Richard Franklin Gough proves to be the devisee, he cannot have the benefit of proceedings in a former suit to which the party in that suit was not entitled. Such a decree might pass by consent, but not otherwise. Perhaps the appeal might stand over, with liberty to re-hear the cause on the supplemental suit. But another supplemental bill will be necessary to bring an assignee of Richard Franklin Gough before the Court. Then it must be considered whether you can be entitled to the supposed interest of Maria Rylands. The proper course would have been to revive the proceedings as they stood on the death of Thomas Gough.

Mr. Blake :—There have been cases where third persons have been allowed to take the benefit of a decree.

Lord Redesdale :—There is a difference between

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the cases of persons who are incidental parties, as legatees, creditors, &c. and sole subsisting independent parties. Suppose the case of a bill to execute a trust to sell an estate for payment of debts, and a person is made a party as the representative of a surviving trustee, who proves not to be so ; in such a case, if the suit is perfect in other respects, the error might perhaps be corrected, and the benefit of the proceedings had by a supplemental suit. But here is a substantial defect of parties.

Lord Redesdale :—The suit in this case was 14 July, 1820. instituted by Thomas Gough, and on his death revived by Maria Rylands, who obtained a decree. It had in the mean time been discovered, that the will under which she claimed as devisee had been superseded by a subsequent will, which was established by a decree of the Court, obtained in a suit instituted by Richard Franklin Gough, the devisee, in the second will. Then followed an agreement, which it was not competent to the parties to make, that Richard Franklin Gough should have the benefit of the suit pending on behalf of Maria Rylands in the character of devisee. The decree was made in the cause, and the appeal brought before the House substantially as the appeal of Maria Rylands, who had, in fact, no interest in the suit. The cause stood over, by permission of the House, to correct that mistake. A bill was then filed by Richard Franklin Gough against the Latouches, and the assignee of his estate, to have the benefit of the former suit. The decree upon that bill gives him the benefit of the former suit as executor. That,

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at the utmost, can only extend to the accounts to be taken up to the time of the death of Thomas Gough. Beyond that interest the claim upon the former suit is a mere nullity. As to all other matters the bill is dismissed; and according to the decree, the title can be sustained in the character of executor only, and not as devisee. In addition to this difficulty, and supposing the title as devisee sustainable, the assignment under the insolvent act took all estate and right out of Richard Franklin Gough, and vested it in the assignee. On the hearing of the supplemental suit the assignee declared, that he had never assented to undertake the trust or administration of the insolvent estate. The law does not compel an acceptance of such a trust, and in consequence of this refusal on record, the parties are left in the same situation as if there had been no assignee. In this predicament how can you proceed? If the respondents had appealed, the House might have determined the question so far as you are entitled as executor; but, in fact, the present subject-matter of appeal respects the interest of a devisee, and not an executor.

Mr. Horne :—We may have the benefit of the account if we assent to confine it to the lifetime of Thomas Gough.

Lord Redesdale :—The Court has decreed, that a certain balance is due upon the mortgage. The executor, therefore, has no interest.

Mr. Horne :—We ask as personal representatives the benefit of the original decree.

Mr. Blake :—The sum reported due has been paid but we seek to recover it; that must be by payment to the personal representatives.

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Lord Redesdale :—The original bill prays that the deed conveying the whole estate may be declared void. The decree accordingly, in the revived suit instituted by Maria Rylands in the character of devisee, declares the deed to be fraudulent and void, and directs accounts of all monies due on the mortgage, &c. and all rents and profits, &c. as on the claim of a devisee. The master takes the account of the rents and profits to the date of the report. To the sum reported due on the first report Maria Rylands could not have title as executrix, but as devisee. You now seek to have the benefit of the decree in that suit, which includes the rents and profits from the death of Thomas Gough.

Mr. Horne :—We give up so much of the decree. The appellants contend that the mortgage debt was overpaid during the life of Thomas Gough by receipt of rents, and they claim to be entitled to the surplus.

Lord Redesdale :—Why did the Court dismiss the bill as to the right of the devisee?

Mr. Blake :—It was supposed that the question as to the realty was concluded, and there remained only a question of account.

Lord Redesdale :—Instead of filing a bill to have

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the benefit of the proceedings, you should have revived the suit of Thomas Gough.

Mr. Horne :—The conduct of the parties has given validity to the decree.

Mr. Hart :—No such fact is put in issue.

Lord Redesdale :—The account stated by the master, from the death of Gough in 1804, amounts to £. . Suppose the House were of opinion that the report is right, we are sustaining the transaction without proper parties. This is in substance a decree for redemption. I do not see how it is possible to cure the defects of the case. If the respondents had appealed so far as the decree gives the benefit of the former proceedings, and the appellants so far as the bill is dismissed in respect of the rights of the devisee, some course might have been adopted. But in the actual state of the cause, supposing the House were of opinion that it is possible or probable that the principal and interest of the mortgage were liquidated by receipt of rents and profits during the life of Gough?

Mr. Horne :—You might send the cause back to take the accounts.

Lord Redesdale .—We could do no such thing in the absence of the devisee, or those to whom his right is transferred.

Mr. Blake :—The bill was originally filed by

Maria Rylands as devisee, and the personal representatives also were parties. The cause might, perhaps, be reheard on the supplemental bill.

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Lord Redesdale :—The devisee or his representative must be a party.

Mr. Blake :—In *Binks v. Binks** in Chancery, August 1814, a mortgagee filed a bill for a sale under a trust. Before the decree he conveyed his whole interest, and his assignees were permitted to have the benefit of the decree which he obtained.

The *Lord Chancellor* :—You have never heard of such a case before or since. I never heard of such a practice.

Lord Redesdale :—The case of *Binks v. Binks* July 17 is not an authority in point. There the party assigned for payment of debts, reserving the surplus, and the assignee had an interest and right to prosecute the suit. There the decree was defective only because incidental parties were not before the Court. Here the party prosecuting the suit had no interest according to the case made by the bill, and no right to the decree. It seems to me impossible to dispose of the case in its present circumstances; the question in substance being, whether Richard Franklin Gough is entitled to recover from the respondent a sum which he paid representing Maria Rylands as a devisee? The estate is only redeemable by the de-

* See the note at the end of the case, where an abstract of the facts of this case is given from the Registrar's book.

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visee, or those who claim in his right, and how can the cause proceed without a nominal assignee, at least, to represent the creditors?

July 19.

Lord Redesdale.—This case was first before the House in 1818. We were then embarrassed by the state of it.* According to the state of the pleadings at that time, Maria Rylands appeared to have the whole beneficial interest, but in fact had only a legacy under the second will, which the parties agreed to keep out of view in that suit, and to continue the proceedings for the benefit of Richard Franklin Gough. The decree was for accounts and redemption in favour of Maria Rylands, as devisee, and the other plaintiffs as executors under the first will of Thomas Gough. On the ground of this private agreement Richard Franklin Gough made himself a party to the original appeal, stating the second will and the agreement. Under these circumstances the House, finding it impossible to proceed on such an agreement, retained the appeal, giving liberty to the parties to supply the defects of their case by such proceedings as they might be advised to institute. A suit was thereupon commenced by Richard Franklin Gough. The cause was heard on the 10th of May 1819, and the decree declares the plaintiff to be entitled as executor of Thomas Gough inaccurately, for he was not sole executor. It declares, that as such he is entitled to

* Here the noble lord stated the facts from the pleadings as they were set forth in the appeal cases, according to which it appeared that Richard Franklin Gough, who had made himself a party to the original appeal, had no interest in the property.

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the benefit of the former decree, that is, of all the proceedings; as to the rest of the prayer, the bill is dismissed. The decree, therefore, appears to be in favour of one of two subsisting executors; and the claim of the plaintiff in that suit as devisee is dismissed, both as against Messrs. Latouche and Massey the assignee. This is a singular mode of proceeding. Supposing Richard Franklin Gough entitled in this suit as one of two executors, something was necessary to be done as to the co-executor; and it seems that the parties are conscious of this defect, as they have made him a party to the appeal. The whole proceeding has been so strangely managed that it becomes difficult to know what course ought to be pursued. In the court below it has been declared that Richard Franklin Gough is entitled to the benefit of the proceedings in the former suit. But the question material for consideration is, whether we have before the House proper parties to maintain the interests mentioned in the appeal? What is the nature of the suit? A bill to have the benefit of former proceedings, not to carry on the unexecuted part of a decree, but to continue the whole for the purpose of reversing a part. The facts require attention;* and the difference in characters and relations of the defendants. David Latouche was mortgagee and custodee; John Latouche was head landlord and purchaser of the lands. The

* Here the noble lord read the facts from the case, as shortly stated in the beginning of the Report. Many of the facts stated in the bill to make a case of oppression, which formed the ground of the original suit, are omitted in the report, as being irrelevant to the points before the House.

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original decree declared the purchase void as against Maria Rylands and her trustees, under the first will, who were also executors. The decree undoubtedly operated upon them in their characters of personal representatives, but in substance was founded on their rights as devisees, under the first will of Thomas Gough. It could stand upon no other right. As executors they might be required to discharge the debt on the mortgage security. But the decree declared the plaintiffs in that suit to be entitled to a redemption of the lands, on payment of the balance (if any) due on the mortgage. To that relief, and to have the purchase declared fraudulent and void, they could only be entitled as devisees in trust. As to that part of the decree, John Latouche, as purchaser, was the only defendant interested. David Latouche was mortgagee and custodee, and the account directed was general; comprehending all these parties without distinction, although standing in such different rights and characters. This confusion might be a matter of indifference to the defendants, who being connected, might adjust the accounts between themselves; but for the sake of regularity in the administration of justice, it is to be regretted that decrees in Ireland are so imperfectly drawn up. The effect of the decree was to make the estate redeemable, according to the result of the account. The suit was instituted in respect of real estate, which was first mortgaged and afterwards sold. It was to be reconveyed, on payment of what should appear to be due on balance of all the accounts. On taking the accounts, which of necessity comprised rents accrued since the death of Gough

in 1804, a balance was found due to the plaintiffs. Exceptions to this report were filed, on the ground that the account was improperly taken, and these exceptions were in part allowed. Upon the second report the balance was in favour of the defendants; and it is observable, that in the schedule to this second report the master charges the defendants with rents received since the death of Thomas Gough. After the decree, founded upon the second report, was pronounced, Richard Franklin Gough paid what was found due upon the accounts, and took a reconveyance of the estate. After this payment and reconveyance the appeal is presented against the orders by which the exceptions are allowed in favour of the Respondents, and the object of the Appellants is to have these orders reversed, and the former report re-established. The proceedings are so irregular that it is difficult to know how to deal with the case. The original decree cannot be carried into execution for the benefit of the plaintiffs in the supplemental suit, for it was void as a proceeding, by parties having no interest. Upon the subject of costs it may be fit to consider that the respondents have been improperly put to expense, in consequence of the appellants having concealed the fact that a later will existed. The appeal in its present state cannot be heard for the purpose of deciding whether the account is properly taken, what is the balance, and to which party due. Those are inquiries which cannot be made without considering the title, and in the absence of the devisee; yet the bill being instituted by Richard Franklin Gough in that character, it is declared that he has no title as

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devisee to the benefit of the proceedings, but only as executor. It has been dismissed, and that is not made the ground of appeal. As executor the appellant cannot be entitled to the benefit of the proceedings. It is difficult to frame any order in such a case. It would have been better if the former appeal had been at once dismissed. It was retained as an indulgence to the parties, to give an opportunity of making their case perfect. They have not done so; and the House can give no judgment on the merits of the case: but an order may be pronounced in terms which point out to the parties the errors in their proceedings, that they may now endeavour to correct them. It might be to the following effect * :

“ The matter of the revived and amended petition of appeal, wherein Maria Rylands, Richard Franklin Gough and John Franklin, are Appellants, and Peter Latouche, Robert Latouche, George Latouche, John David Latouche and Peter Latouche, junior, are Respondents, having come on to be heard before this House, and it appearing to the House, from the petition of appeal and the cases delivered on the part of the Appellants, and the proceedings of the Court of Chancery in Ireland delivered to the House, that the original petition of appeal had been presented by Maria Rylands, widow, and Richard Franklin Gough, only complaining of an order of the Court of Chancery in Ireland, bearing date the 23d of

* This order was proposed for the consideration of the House, but it was not moved, and does not appear in the journals. The cause has since abated by the death of one of the parties, and has not been again before the House.

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“ March 1808, and a decree of the said Court,
“ bearing date the 27th of June 1808, made in a
“ cause in which the said Maria Rylands, John
“ Hamilton and William Crawford, were plaintiffs,
“ and the Right Honourable David Latouche and
“ others were defendants, and that Richard Franklin
“ Gough, who was named in the case delivered on
“ the part of the Appellants as a joint appellant with
“ the said Maria Rylands, was no party to the said
“ cause in which such order and decree so appealed
“ from were pronounced; and it also appearing to the
“ House that the proceedings in the said cause were
“ founded on an original bill filed by Thomas Gough,
“ deceased, against the said David Latouche, John
“ Latouche, and others, impeaching a sale and con-
“ veyance made by the said Thomas Gough to the
“ said John Latouche, and a mortgage made by
“ him to the said David Latouche of divers lands
“ in the county of the city of Limerick, which the
“ said Thomas Gough held by lease for lives, with
“ a covenant for perpetual renewal of such lease, and
“ that the said Thomas Gough having died before
“ the said cause had been brought to a hearing, the
“ said Maria Rylands claiming to be beneficial de-
“ visee of the said lands under the will of the said
“ Thomas Gough, and the said John Hamilton and
“ William Crawford claiming to be executors of such
“ will, and the only executors who had proved the
“ same in the Ecclesiastical Court, and George
“ Lloyd and Henrietta Gough, two other executors
“ named in the said will, had filed a bill of revivor
“ and supplement, founded on the said bill filed by
“ the said Thomas Gough, and had, claiming in

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“ those rights on the 28th of June 1806, obtained
“ a decree of the said Court of Chancery, setting
“ aside the conveyance of the said leasehold estate,
“ and ordering divers accounts to be taken between
“ the parties to such suit, and that the said order of
“ the 23d of March 1808, and the said decree of
“ the 27th of June 1808, had been made in such
“ cause, in which the said Richard Franklin Gough
“ had been a party, but having been struck out by
“ amendment, was no party at the hearing ; and it
“ appearing by a bill filed by the said Richard
“ Franklin Gough against the said Maria Rylands
“ and others, that the will of the said Thomas
“ Gough, under which the said Maria Rylands,
“ John Hamilton and William Crawford, claimed,
“ had been revoked by a subsequent will, by which
“ the real and personal property of the said Thomas
“ Gough had been devised to the said Richard Frank-
“ lin Gough ; and the said Richard Franklin Gough
“ and John Franklin (who has now made himself a
“ party to the said petition of appeal by amendment,
“ together with the said Maria Rylands and Richard
“ Franklin Gough) had been appointed executors of
“ such will, and had proved the same, and that
“ therefore neither the said Maria Rylands nor the
“ said John Hamilton or William Crawford, as
“ devisees and executors of the said Thomas Gough,
“ or the said George Lloyd and Henrietta Gough,
“ had any right to revive the suit so instituted by
“ the said Thomas Gough as his devisees, but that
“ such right was (as now appears) vested in the said
“ Richard Franklin Gough, and that the said
“ Richard Franklin Gough and John Franklin are

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“ the executors and personal representatives of the
 “ said Thomas Gough ; and the matter of the said
 “ petition of appeal presented by the said Maria
 “ Rylands and Richard Franklin Gough having been
 “ called on to be heard before the House on the 20th
 “ of May 1818, and it appearing to the House that
 “ under the circumstances then disclosed the House
 “ could not properly proceed to hear the matter
 “ of the said appeal, and having therefore adjourned
 “ the consideration thereof, and on the 10th day
 “ of June 1818, ordered that the parties should
 “ be at liberty to take such proceedings in the Court
 “ of Chancery in Ireland as they might be advised,
 “ in order to make proper parties to the cause, and
 “ bring all proper parties before the House ; and
 “ it appearing to the House that the said Richard
 “ Franklin Gough afterwards filed a bill in the said
 “ Court of Chancery in Ireland against the Respon-
 “ dents and against the said Maria Rylands and
 “ John Franklin, and against John Massey, chosen
 “ assignee of the estate and effects of the said Richard
 “ Franklin Gough, who had been discharged from
 “ prison under an act of the 53d year of his late
 “ Majesty’s reign, for relief of insolvent debtors,
 “ praying that he might have the benefit of the suit
 “ instituted by the said Thomas Gough, and revived
 “ by the said Maria Rylands and others, and of all
 “ proceedings, orders, and decrees in the said original
 “ and revived suit, so that the said Richard Franklin
 “ Gough might be entitled to appeal therefrom ;
 “ and it appearing that such cause was heard in
 “ the said Court on the 10th day of May 1819,
 “ when it was decreed, that as between the plaintiff

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“ Richard Franklin Gough, and the defendants
“ Robert Latouche, and others, Respondents in the
“ revived and amended appeal, the said Richard
“ Franklin Gough as executor of the said Thomas
“ Gough was, and he was thereby declared to be,
“ entitled to the benefit of the proceedings in the
“ pleadings mentioned, as prayed by this bill ; and
“ that as between the plaintiff and the said defen-
“ dants the remainder of the said bill claiming as
“ devisee of the said Thomas Gough should be
“ dismissed ; and as to the defendant John Massey,
“ assignee of the said Richard Franklin Gough,
“ the said bill should also be dismissed, and the
“ said Maria Rylands and Richard Franklin Gough,
“ who had presented such original petition of appeal,
“ thereupon obtained the order of the House as of
“ course, that they should be at liberty to amend
“ their original appeal, and make the appellant
“ John Franklin a party thereto ; and the matter
“ of the said appeal coming on to be heard before the
“ House on the 5th day of this instant, July, it
“ appearing to their Lordships, that under the cir-
“ cumstances of the case the House could not pro-
“ ceed to pronounce any decision on the said appeal,
“ inasmuch as already by the said decree of the 10th
“ of May 1819, which has not been appealed from
“ by any of the parties, it was declared, that as
“ between the said Richard Franklin Gough and the
“ defendants, the Respondents and John Latouche
“ deceased, the said Richard Franklin Gough, as
“ executor of the said Thomas Gough, was entitled
“ to the benefit of the proceedings mentioned in
“ the pleadings in the suit instituted by him as

“ prayed by this bill ; but such decree had declared
 “ no right of the said John Franklin as his co-exe-
 “ cutor, and by such decree the said bill of the said
 “ Richard Franklin Gough had been dismissed, as
 “ between the said Richard Franklin Gough claim-
 “ ing as devisee of the said Thomas Gough, and the
 “ said Respondents and the said John Latouche
 “ deceased ; and the said bill had also, by the said
 “ decree, been dismissed against the said John
 “ Massey, so that there is no person before the House
 “ in whom the property of the said Richard Franklin
 “ Gough is vested, in consequence of his discharge
 “ under the said act for relief of insolvent debtors ;
 “ and inasmuch as the said decree of the 28th of
 “ June 1806, was and could only have been obtained
 “ by the said Maria Rylands, John Hamilton and
 “ William Crawford, as devisees as well as executors
 “ of the said Thomas Gough, and the same and the
 “ subsequent order of the 23d of March 1808, and
 “ the subsequent decree of the 27th of June 1808,
 “ were founded on the supposed rights of the said
 “ Maria Rylands, John Hamilton and William
 “ Crawford, as devisees as well as executors of the
 “ said Thomas Gough, the House cannot proceed
 “ to determine the merits of the appeal against the
 “ said order of the 23d of March 1808, and the said
 “ decree of the 27th of June 1808, without having
 “ before them the said Richard Franklin Gough in
 “ the character of devisee in the will of the said
 “ Thomas Gough, and also without having before
 “ them such person as may be entitled to be assignee
 “ of the estate of the said Richard Franklin Gough,
 “ under the said act for relief of insolvent debtors,

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“ especially as it appears on the face of the proceed-
 “ ings before the House, that the said decree of the
 “ 28th of June 1806, on which the said order and
 “ decree appealed from were founded, was obtained
 “ by persons who had no right to the estate in ques-
 “ tion; and in consequence of a private agreement
 “ between them and the said Richard Franklin
 “ Gough, to which the defendants in the said cause
 “ do not appear to have been parties or privies, and
 “ which agreement does not appear to have been
 “ disclosed to the Court at the time of such decree,
 “ or during the subsequent proceedings, and there-
 “ fore may be deemed to have been a fraud on the
 “ said Court, and on the other parties to the said
 “ suit, and it therefore may be objected at the hear-
 “ ing of the said appeal, that the said decree of the
 “ 28th of June 1806, and the subsequent proceed-
 “ ings thereon, were absolutely void, or were void so
 “ far as the same respected the said leasehold estate,
 “ it is therefore ordered, by the Lords spiritual and
 “ temporal in parliament assembled, that the hearing
 “ of the said appeal do stand over, with liberty for
 “ the several parties interested to take such proceed-
 “ ings as they may be advised in the said Court of
 “ Chancery, respecting the said suit instituted by
 “ the said Thomas Gough, and the suit instituted
 “ by the said Maria Rylands, John Hamilton, and
 “ William Crawford, and the said suit instituted by
 “ the said Richard Franklin Gough, and to bring
 “ before this House parties competent to litigate the
 “ questions which may arise thereupon between the
 “ Appellants and the Respondents, and the right of
 “ the Appellants to prosecute the said appeal; and

“ it is further ordered, that the Appellants do pay
 “ to the Respondents fifty pounds for their costs for
 “ attending the hearing of this appeal in the present
 “ session.”

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Reg. Lib. A. 1813, fo. 1718: b.

BINKS v. BINKS.

In 1809 Thomas Binks, as creditor, &c. filed a bill in Chancery against Lord Rokeby, Fred. Turner, and Phil. M'Farlane, stating an indenture of assignment and mortgage, dated in 1806, by which certain hereditaments, the property of Lord Rokeby, were vested in the defendants Turner and M'Farlane, as trustees for a term of years, to secure the payment of debts owing by Lord Rokeby to defendant Thomas Binks, &c. and upon trust in default of payment, to sell, &c. and assign or pay over the residue, &c. to Lord Rokeby. The bill further stated, that payment was not made according to the trust, and prayed an account of the debt and interest, and immediate payment, or in default, that the estate might be sold for payment, according to the trust.

The cause was heard at the Rolls in July 1811, and by the decree it was ordered, that the defendant Lord Rokeby should pay, &c.; or in default of payment, that an account should be taken of what was due to Thomas Binks, &c., and that so much of the estate should be sold as would be sufficient to pay, &c.; the surplus, if any, to be paid to the defendants Turner and M'Farlane, to be applied upon the trusts of the indenture of 1806. By the report, dated the 8th of August 1812, the Master found the sum due to Thomas Binks, the estate was sold pursuant to the decree and the report of purchase was confirmed by an order, dated on the 15th of January 1813. At this stage of the cause it was discovered that Thomas Binks, being indebted to various persons by mortgage, specialty, and simple contract, had in March 1810, before the date of the decree, assigned all his interest in the estate and debt, comprised in and secured by the deed of 1806, to Richard Binks, Antony Steel, and William Walter, in trust to recover the debt secured by that deed, and to apply the money

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so recovered in payment of the debts of Thomas Binks, enumerated in a schedule annexed to the deed of 1810. In this state of things Richard Binks, Antony Steel, and William Walter, filed a supplemental bill, stating the facts before mentioned; and further, that the solicitor who conducted the cause for Thomas Binks did not know of the deed of assignment of 1810, when the decree was pronounced in the original cause, nor until after the estate had been purchased by, &c.; that the decree, therefore, had been obtained by mistake, and the purchaser refused to complete his purchase unless R. B. A. S. and W. W. were made parties to the cause, and consented to the payment of the purchase-mones into the Bank, in trust, &c.; that the plaintiffs were willing to confirm the proceedings in the former cause, and join in the conveyance; and the plaintiffs submitted that they ought to, and prayed that they might, have the same benefit of the suit instituted by Thomas Binks, and the decree pronounced, and other proceedings had in that cause, as if they had been parties to the cause originally. The defendants Thomas Binks and Anne his wife, by their answer, admitted the facts, and submitted, &c. The defendant Lord Rokeby, by his answer, submitted, that inasmuch as the decree was founded in mistake, and erroneous, it ought not to be carried into execution, and the plaintiffs ought not to have the benefit, &c.; and insisted upon the objection as if he had demurred to the bill. The defendants Turner and M'Farlane admitted the facts, and submitted, &c.

The supplemental cause was heard before the Vice-Chancellor on the 17th of August 1814, when it was "Ordered and decreed, that the former decree and " order should be carried on and prosecuted between " the present parties, in the manner as the same were " directed as to the then parties," and that the Master should tax the costs, &c.

(CHANCERY, ENGLAND.)

PHILIP WESTERN WOOD - - - *Appellant*;

JOSHUA ROWE - - - - - *Respondent*.

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A BILL being filed against two parties praying accounts and relief against both; after one of the defendants had put in an answer, an agreement is made between the plaintiff and the two defendants by their agent, who is also interested as a party to the agreement, containing various provisions as to the transactions of mortgage and partnership in mines, which were the subject of the bill, besides other matters of agreement; and providing that "all proceedings in law and equity shall cease between the plaintiff and the two defendants." This agreement, that all proceedings, &c. shall cease, &c. cannot be pleaded in bar to the whole suit by the defendant who has not answered.

Such a plea may operate to displace the equitable relief sought by the bill, so far as it regards the party who pleads, but as a bar to the whole suit it cannot be pleaded.

Such a plea is, in effect, a plea of one part of the agreement in bar of the whole suit, which is inadmissible.

The object of a plea to a bill in equity is to reduce the subject matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject matter of the dispute, which is not effected by a plea of an agreement, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect.

Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed.

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments that the conditions of the agreement have been performed, or

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from circumstances could not be performed; and that the other parties not joining in the plea are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But *semb.* that in such a case the court not having the power to compel the performance of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement.

It lies upon the party seeking the performance to take the steps necessary to enforce it, and not upon the other party bound by the agreement, being plaintiff in the original suit, to intercept the effect of the agreement by filing a supplemental bill.

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action.

Such an agreement is totally different from a release under seal, but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties.

Such a plea, containing no averments, that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it.

Semb. That affidavits (filed upon interlocutory proceedings) are to be considered as matters of record, and that the facts disclosed by affidavits so filed may be viewed by the court in deciding upon the validity of a plea.—*Quere.*

THE Respondent Joshua Rowe, in 1816, filed a bill in Chancery against the Appellant Mat-

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thew Wood, and Sir A. O. Molesworth, stating transactions between the Respondent and Matthew Wood, and deeds and instruments whereby an interest in mines, called Great and Little Crinnis, Campdown and Appletree, vested in the Respondent for terms of years, and a judgment in the court of Common Pleas entered up against the Respondent for the sum of 20,000*l.* were assigned to Matthew Wood, by way of security for the payment to him of monies due and to become due to him from the Respondent; and stating also, contracts entered into by Matthew Wood for the purchase of $\frac{3}{8}$ th shares, and by the Appellant of $\frac{1}{8}$ th shares in the mines; and further stating an indenture bearing date the 16th of December 1814, made between the Respondent of the one part and Matthew Wood of the other part, reciting an agreement between the parties thereto as to the taking and adjusting of the accounts relative to the mines, by which indenture the $\frac{3}{8}$ th shares in the mines were assigned by the respondent to Matthew Wood; and further stating an indenture of the same date, made between the Respondent of the one part and the Appellant of the other part, to the same purport and effect, *mutatis mutandis*, as the first mentioned indenture, whereby the $\frac{1}{8}$ th shares in the mines were assigned by the Respondent to the Appellant.

The bill further stated that Matthew Wood executed a power of attorney to Benjamin Wood, authorizing him to take possession of the mines, as the agent and for the benefit of Matthew Wood; and that in pursuance of the power, Benjamin Wood, in March 1815, entered into possession of

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the mines, as the agent of Matthew Wood, and had ever since been and then was in possession, and had ever since worked, and then worked the mines. The bill further stated, that the Respondent from time to time, after the month of November 1812, transmitted to Matthew Wood blank bills of exchange, upon stamps, sufficient to warrant the drawing of 50,000*l.* at least, that the same were all signed by the Respondent, either in the character of acceptor or drawer; that Matthew Wood had (as the Respondent believed) filled up the blank bills, and negotiated or disposed of several of them, in some way, for his own use; and that since the month of March 1815, when Benjamin Wood took possession of the mines, Matthew Wood had carried on the business under the firm of the Crinnis Mine Company, and had issued bills of exchange in the name of the Crinnis Mine Company.

The bill further stated, that Matthew Wood had caused the complainant's effects to be seized in execution for the sum of 8,948*l.* 11*s.* 4*d.* and that such execution was taken out on the judgment for 20,000*l.* The bill charged, that in a certain account made out by Matthew Wood, of the dealings between him and the Respondent, there were divers errors and improper charges, and in particular that the Respondent was therein debited with the sum of 9,470*l.*, though in fact the same was money paid by Matthew Wood for purchases on his own account; and further charged, that Sir A. O. Molesworth, the then sheriff of the county of Cornwall, intended forthwith to proceed to a sale of the Respondent's effects seized in execution.

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The bill prayed that an account might be taken of the several dealings and transactions in the bill mentioned; and that the balance due thereon from Matthew Wood to the Respondent might be ascertained and paid, he being ready to pay what, if any thing, might be found due from him upon taking the account; and that either the Appellant and Matthew Wood might be declared to be partners with the Respondent in the mines, and that an account might be taken of all the profits of the mines received by the Appellant and Matthew Wood, or either of them, &c. and that the Respondent might have credit in taking the account for his share of the profits, and for what was due and unpaid for the Appellant's and Matthew Wood's shares in the mines, and for the blank bills of exchange, and that proper directions might be given for the payment of the bills drawn in the name of the Crinnis Mine Company, or such of them as were outstanding; or in case the court should be of opinion that the Appellant and Matthew Wood were not partners with the Respondent in the mines, then that a like account might be taken of the profits thereof received by, or by the order, or for the use of the Appellant and Matthew Wood, or either of them; and that the Respondent might have credit given to him in taking the account for all those profits and for the blank bills of exchange, and for all the bills issued by Matthew Wood, in the name of the Crinnis Mine Company, or might be indemnified against the bills; and that the Appellant and Matthew Wood might, upon being paid what, (if any thing,) was due to them, deliver up possession of the mines, and the

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stock therein, to the Respondent; and that the Appellant and Matthew Wood respectively might in the mean time be restrained by injunction from issuing or negotiating any bills or notes in the name of the Crinnis Mine Company, or any of the blank bills of exchange, and from using the name of the Crinnis Mine Company in any manner; and that Matthew Wood might also be restrained by injunction from proceeding in the execution, and from all other proceedings at law under the judgment; and that Sir A. O. Molesworth might, in like manner, be restrained from selling the Respondent's effects, or from otherwise proceeding in the execution. *

* The bill was unusually long, but contained no other allegations material to be stated for the purpose of making the plea and the judgment upon the appeal intelligible. On account of the observations made by the Lord Chancellor in moving the judgment (Post. 606, et seq.) a short statement of the proceedings which occurred between the filing of the bill and the plea is here introduced by way of note.

On the 19th of July 1816, the statements of the bill being supported by affidavits, an injunction to restrain proceedings under the execution was applied for, *ex parte*, and granted.

A joint and several answer had been prepared for the Appellant and M. Wood. In the month of November 1817, M. Wood alone swore to the answer, with an understanding (as stated by affidavit) that P. W. Wood should not be required to answer until certain proceedings then pending in an ejectment, which related to the mines, should be determined.

On the 29th of January 1818, the sheriff applied for a receiver of the effects, which had been levied under the execution. An order was accordingly made with the consent of all parties, and the appointment was afterwards completed with the usual recognizances.

No further step was taken in the cause until the month of

The Appellant put in upon oath the following plea :—

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“ This defendant, &c. saith, That since the said
“ bill of complaint was exhibited, the said com-

July 1819, when the plaintiff issued an attachment returnable immediately against P. W. Wood for want of an answer. Notice of a motion having been given to set aside this attachment, affidavits of what had taken place in the intermediate time were filed by both parties.

An affidavit was filed by the Respondent, as explanatory of the case, and a joint and several affidavit by the Appellant and two other persons, in which the agreement was set forth; it then proceeded to state, that in pursuance and furtherance of the agreement, the Respondent and Benjamin Wood, acting on behalf of M. Wood and the Appellant, had investigated accounts; and that on the 6th of March 1819, *a farther agreement* was made between the parties, in which the account between the Respondent and M. Wood and the Appellant was set forth according to the result of the investigation. At the end of this statement of account appears the following reservation:—“ The above account is correct, subject to the following respective claims and charges; the same to be agreed on between the undersigned, if possible, if not, to be referred in two months from this date.” Then follow several claims for credit, &c. among which is a claim on the part of *M. Wood and the Appellant to be credited for the profits on 24 64th shares*, in Wheal Regent, from the 27th of May 1818. The memorandum concludes thus :—

It is agreed between the undersigned, that particulars of all accounts of every description shall be forthwith furnished mutually for the settlement of the above claims and charges.

It is agreed to refer the valuation of the ship timber to, &c.

It is also agreed to refer the claim for stock, and rent of Dartmoor brewery, on, &c. to, &c., they to call in a third person if they do not agree.

(signed) Josh. Rowe,

The Crinnis Mine, }
6th March 1819. }

B. Wood, for Matthew Wood.

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“ plainant and M. Wood, and this defendant being
 “ mutually desirous of determining all proceedings
 “ under the said bill, Benjamin Wood, as agent
 “ for the said M. Wood and of this defendant,
 “ as also in and on his own individual capacity
 “ and behalf, and the said complainant did for that
 “ purpose, amongst others, on or about the 27th
 “ day of May 1818, make and enter into and duly
 “ sign an agreement in writing, which was and is
 “ in the words and figures following, (that is to
 “ say;) We, the undersigned, hereby mutually agree
 “ to the following effect: viz. ‘ That Wheal Regent
 “ forms a part of Campdown Set, and is therefore
 “ included in the sale to M. and P. Wood, and
 “ also in the mortgage securities to M. Wood, but
 “ as she has made no profit up to this time, the
 “ accounts respecting the same shall not be taken
 “ one way or the other, but from this date.’ ‘ The
 “ nine accounts during the possession of J. Rowe,
 “ and also during the possession of M. Wood, to be
 “ settled as per deed dated on or about December
 “ 1814, between the undersigned, if possible; if not,
 “ by two indifferent persons, one to be named by
 “ each of the undersigned: All the ship-timber
 “ now undisposed of to be taken at a valuation of

The Respondent claimed credit for the balance of purchase-money on the shares sold to M. Wood and the appellant, and for profit on the residue of the shares.

On the 31st of July 1819, the Lord Chancellor, upon the ground that the attachment had issued without a full communication with the defendants as to the steps intended to be taken in the cause, ordered it to be set aside, without costs, and without prejudice to any future proceedings.—See 1 J. and W. p. 322.

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“ two indifferent persons, and if they do not agree,
 “ then to call in a third, and the same to be charged
 “ to the mine account.’ ‘ M. Wood to give J. Rowe
 “ 1, 2, 3, 4 and 5 years, by equal instalments, for
 “ the payment of the balance due upon making
 “ up the accounts, which is agreed to be done
 “ without delay, between M. Wood, P. Wood and
 “ J. Rowe ; but whatever J. Rowe may deliver in
 “ stores to the mine, including the before-mentioned
 “ ship-timber, as well as his proportion of the profits,
 “ to go towards the next instalment coming due,
 “ but M. Wood to be paid as much sooner as the
 “ profits may amount to.’ ‘ J. Rowe agrees to the
 “ charge of 1,000*l.* per year to the mines for B.
 “ Wood’s services.’ ‘ M. Wood to remain in full
 “ possession of the mortgage property as he is at
 “ present, but J. Rowe to have the control of the
 “ working part of the mine ; B. Wood to receive
 “ and pay every thing, and to purchase and manage
 “ all the stores.’ ‘ The injunction to be immedi-
 “ ately dissolved, and the execution withdrawn, and
 “ *all proceedings in law and equity to cease between*
 “ *J. Rowe and M. and P. Wood,*’ (thereby mean-
 “ ing the complainant and M. Wood, and this de-
 “ fendant.) ‘ When J. Rowe has paid the balance
 “ of the account due to M. Wood, on making up
 “ all accounts between him and M. and P. Wood,
 “ the securities to be re-assigned.’ ‘ Should any
 “ difference arise hereafter between J. Rowe and
 “ M. and P. Wood, the same to be left to two in-
 “ different persons, one chosen by each party, and
 “ if they cannot agree, a third to be called in.’
 “ Should any deeds be required to carry the above

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“ arrangement into effect, the same to be prepared
 “ by Mr. Joseph Edwards, as adviser between the
 “ parties.’

“ ‘ J. Rowe to assign to B. Wood all his pro-
 “ perty and debts, for the benefit, of his common
 “ creditors, they agreeing not to proceed against
 “ him in law or equity for 5 years, from the 1st of
 “ June next.’ ‘ All payments and receipts to be
 “ made by B. Wood, and what purchases may be
 “ required for carrying on any of the works of the
 “ said J. Rowe, to be made by the said B. Wood ;
 “ but the management of the said works to remain
 “ under the control of the said J. Rowe, B. Wood
 “ making such dividends within the 5 years as he
 “ may be enabled to from the monies in his hands.’
 “ ‘ J. Rowe not to draw for more than 1,000*l.*
 “ per year from his estate, for his maintenance.’
 “ ‘ B. Wood to charge 5 per cent. on all the monies
 “ he receives for his trouble, and also to charge what
 “ other actual expenses he may pay or incur ; but
 “ the 5 per cent. to include all other commissions.’
 “ Dated this 27th day of May 1818. ‘ *B. Wood,*
 “ for self, *M. & P. Wood—J. Rowe.*’

“ And this defendant doth aver, That the said
 “ B. Wood, at and before the time of the signature
 “ of the said agreement by him and the said com-
 “ plainant, was duly authorized and empowered to
 “ enter into and sign such agreement, as the agent
 “ for and on behalf of this defendant and the said
 “ Matthew Wood.

“ And this defendant doth also aver, that by
 “ the proceedings in equity, which it is by the
 “ agreement stipulated should cease between the

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“ complainant and M. Wood and this defendant,
 “ were meant and intended the proceedings in this
 “ present suit; and that at the time when the
 “ agreement was entered into and signed, there was
 “ not, nor were there any other suit or proceedings
 “ in equity, between the complainant and M. Wood
 “ and this defendant, or either of them, than this
 “ present suit and the proceedings therein.

“ And this defendant doth also aver, that the
 “ agreement hath not been waived or determined,
 “ but is now subsisting and in full force; and this
 “ defendant doth therefore plead the matters afore-
 “ said, in bar to the said complainant’s bill of com-
 “ plaint, and the relief and discovery thereby sought;
 “ and he humbly hopes to be hence dismissed with
 “ his reasonable costs in this behalf sustained.”

The plea was argued before the Vice Chancellor,
 on the 10th of November 1819, and allowed.

The respondent thereupon presented his petition
 of appeal against the order allowing the plea to the
 Lord Chancellor.

The appeal was heard in April 1820, when the
 Lord Chancellor reversed the order of the Vice
 Chancellor, and overruled the plea.

Against this order of the Lord Chancellor the
 appeal to parliament was presented.

For the Appellants:—*Mr. Heald, Mr. Sugden,*
 (and *Mr. Sidebottom.*)

For the Respondent:—*The Attorney General,*
 and *Mr. Horne.*

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The Lord Chancellor :—

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[After some prefatory observations, and stating the effect of the pleadings and proceedings ;]

There are two ways in which this question must be considered. In the first place, I am not quite prepared to say that the affidavits filed in the cause might not be judicially noticed by the Court, nor do I say they could, nor do I mean to state that they had not a considerable influence on my mind *. The first question is, whether they ought or ought not to be looked at as a matter of record, to enable us to determine upon the validity of this plea? Considering the affidavits as matter of record, suppose that on Monday the attachment had been disposed of, and on Tuesday this plea had come before me, if I could not have judicially taken notice of the affidavits, I should have had entirely to forget them, which would have been a difficult operation. As matters of record they might be looked to. Considering the nature of this agreement, and looking at the averments, the Court was authorized to say argumentatively, and supposing such facts had taken place which the affidavits say did take place, and if the facts had taken place before the agreement, could those facts form a part of this plea; and if necessary to form a part of the plea, how could it be supported not noticing those facts? In these circumstances I think it would have been perfectly correct to look at the affidavits in a

* One of the facts averred by affidavit was, that the Respondent had been fraudulently induced by the Appellant and M. Wood to sign the agreement. This was denied by the affidavits of the opposite parties. The same fact was alleged by the petition of appeal from the judgment of the V. C. to the Lord Chancellor.

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judicial point of view. When the case came before me I was puzzled to know how to deal with it. I observed that it was the first time within my experience that such an executory contract had been pleaded. It was asked, did you ever hear of a Court allowing such a plea? and the answer was, did you ever hear of such a plea being overruled? On which my observation was, that I never heard of any such plea being allowed, or, on the other hand, of any such plea being overruled. I have considered with great attention the observations made on the subject of supplemental bills, according to the view which the Court below* took of the case: Where it was said this agreement applies to the whole suit, for by one of the terms of the agreement the Court is bound to dismiss the bill, and if any thing has been done to deprive the defendant of the benefit of that plea, it must be made available by a supplemental bill.

The important view of the case, taken by one of your lordships†, that it is a plea of one where the suit is against several, and where the interests of several are affected, did not wholly escape me. This view of the case presented itself to my mind: Supposing this agreement has not been acted upon in such a way that Rowe could compel the performance of it against Matthew Wood, then Philip Western Wood pleads this plea; and supposing land should have fallen in value, would there have been any thing to hinder Matthew Wood from saying, I am not bound to remain the purchaser of these shares in this mine; I will not join in the plea; I have no desire to enforce the agreement against Rowe; I will not be the purchaser of these shares in the character

* The Vice Chancellor.

† Lord Redesdale.

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which the agreement would fix upon me. The grounds upon which I proceeded were these : In the first place this being an executory contract merely under the signature of the party, (I say nothing of a release under seal), I could not bring my mind to think that such an executory contract in a court of equity could be a bar to the whole of this suit : in the next place, if I had been bound to give my opinion upon it, I should have thought, from the contents of this agreement, all taken together, that a court of equity would have found it so difficult to execute that it would not have been executed. Whatever might be the law on the one side or on the other, looking at the date of this agreement, and the time when the plea was pleaded, I was of opinion that the plea was defective in matter altogether ; and that it was defective in averment. It was asked by the counsel for the Appellant, Suppose it had been pleaded immediately after it was signed, would it not have been a good plea ? Why, to be sure, pleading it then, the performance of the conditions of the agreement could not have been averred. At that moment it must have been averred, that under those circumstances, (which averment this plea wants,) they could not have been performed.

I forbear to enter into many other considerations connected with this plea. I do not press into the aid of the disallowance of this plea any of those facts which appeared in the subsequent affidavits. It appeared upon those affidavits, that all the matters of the bill, even important matters, were not covered by the two agreements. Under the first agreement, Rowe could not have the relief which he prays. By the agreement with Matthew Wood, he may take

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into account not only the purchase money which Matthew is to pay for his shares, but also the consideration which Philip Wood is to pay. Under the first agreement that equity could not be enforced. That provision, although it is subsequent to the first agreement, I do not look at as a circumstance affecting its validity; but nobody can deny, on the other hand, that such an agreement, if it is not acted upon, but is merely a contract to be fulfilled, would require that there should be some averment to account why it has not been fulfilled, if it was not meant finally to act upon it.

Lord Redesdale:—

[After stating the pleadings and proceedings;]

With respect to the agreement, which is the foundation of the plea, it is, between Joshua Rowe, Benjamin Wood, Matthew Wood and Philip Western Wood, one entire agreement, which is to have its effect, if at all, according to the obligations which the several parties undertake by that agreement.

“ We, the undersigned, hereby mutually agree to the following effect; that Wheal Regent forms a part of Campdown Set, and is therefore included in the sale to Matthew and Philip Wood, and also in the mortgage securities to Matthew Wood; but as she has made no profit up to this time, the accounts respecting the same shall not be taken one way or the other from this date;” this is a part of the agreement which concerns Philip and Matthew Wood.

“ The mine accounts, during the possession of Joshua Rowe, and also during the possession of Matthew Wood, to be settled as per deed dated on

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“ or about December 1814, between the undersigned,
 “ if possible, if not, by two indifferent persons, one to
 “ be named by each of the undersigned ; ” that is the
 deed on which, as I apprehend, it was contended at
 the bar, as was alleged by Rowe in his bill, that the
 Woods are to be considered as partners : one part of
 the prayer of the bill is, that if they are to be con-
 sidered as partners, then that the account may be
 taken in one way ; but if they are not to be con-
 sidered as partners, then that the account may be taken
 in another.

It is material, in any way of construing this deed,
 to observe, that the agreement does not at all de-
 termine what is the effect of it ; whether they are to
 be considered as partners or not ; if the disputed ac-
 count is not settled by that deed, which it is to do
 if possible, it is to be adjusted by two independent
 persons, “ one to be named by each of the under-
 signed.” Now, though Benjamin Wood is one of the
 undersigned, Philip and Matthew Wood are the per-
 sons intended.

“ All the ship-timber now undisposed of to be
 “ taken at a valuation of two indifferent persons,
 “ and if they do not agree, then to call in a third,
 “ and the same to be charged to the mine-account.
 “ Matthew Wood to give Joshua Rowe, one, two,
 “ three, four, and five years, by equal instalments,
 “ for the payment of the balance due upon making
 “ up the account, which is agreed to be done, with-
 “ out delay, between the said Matthew Wood, Philip
 “ Wood and Joshua Rowe : ” This provision is of
 extreme importance with respect to the effect of the
 agreement, and whether it can or cannot be made a
 matter of plea, as pleaded to this bill, because this being

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a separate stipulation on the part of Matthew Wood, is a part of the consideration of the whole agreement, and if that stipulation on the part of Matthew Wood is not performed, the consideration of the agreement itself cannot be fulfilled.

“ But whatever Joshua Rowe may deliver in stores to the mines, including the before-mentioned ship-timber, as well as his proportion of the profits, to go towards the next instalment coming due but Matthew Wood to be paid as much sooner as the profits may amount to ;” (this provision also relates to Matthew Wood) Joshua Rowe agrees to the charge of 1,000 l. per year out of the mines for Benjamin Wood’s services ;” (here is a provision for Benjamin’s services) “ Matthew Wood to remain in the full possession of the mortgage property, as he is at present, but Joshua Rowe to have the conduct of the working part of the mine :” That is a stipulation between Joshua Rowe and Matthew Wood—a stipulation which, with respect to Mr. Philip Western Wood, has no effect, except as he was to submit that the possession should be in Matthew Wood, and the management of the mine should be to a certain extent in Rowe, that is as to the working part. “ Benjamin Wood to receive and pay every thing, and to purchase and manage all the stores :” That is a stipulation in which Matthew Wood is concerned, as well as Philip, and in which Benjamin Wood is also concerned.

Then comes this stipulation, which is the ground of the plea : “ The injunction to be immediately dissolved, and the execution withdrawn, and all

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“proceedings in law and equity to cease between Joshua Rowe, and Matthew and Philip Wood.” Upon this part of the agreement I shall only briefly observe, in the first place, that the execution could only be withdrawn by Matthew Wood, for Philip Wood had no execution or proceedings at law. They were proceedings on the part of Matthew Wood; and it is a little material also to observe, that there is an agreement that there were no other proceedings in equity, except the suit instituted by Rowe; but there is nothing said respecting the proceedings at law.

“When Joshua Rowe has paid the balance of the accounts due to Matthew Wood, on making up all accounts between him and Matthew and Philip Wood, the securities to be re-assigned. Should any difference arise hereafter between Joshua Rowe and Matthew and Philip Wood, the same to be left to two indifferent persons, one chosen by each party, and if they cannot agree, a third to be called in:” That is indefinitely prospective, extending to any thing which might arise in dispute, and to any period of time during which those mines should be in operation.

“Should any deeds be required to carry the above arrangement into effect, the same to be prepared by Mr. Joseph Edwards, as adviser between the parties; Joshua Rowe to assign to Benjamin Wood all his property and debts for the benefit of his common creditors, they agreeing not to proceed against him in law or equity, for five years from the 1st of June next:” That, I presume, is a stipulation which Matthew Wood and Philip Wood provided, with a view to putting the whole property of Rowe,

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who was concerned with them as to these mines, into such a situation that his creditors might be repaid in the course of time, so as to prevent any embarrassment arising to the mines from any debts due by Rowe.

"All payments and receipts to be made by Benjamin Wood, and what purchases may be required for carrying on any of the works of the said Joshua Rowe, to be made by Benjamin Wood, but the management of the works to remain under the conduct of Joshua Rowe, Benjamin Wood making such dividends within the five years as he may be enabled to from the monies in his hands:" That is an engagement with all the three parties who contract here—all concerned in one way or other, and for the performance of which all were interested.

"Joshua Rowe not to draw for more than 1,000*l.* per year from his estate for his maintenance; Benjamin Wood to charge five per cent. on all the monies he receives for his trouble, and also to charge what other actual expenses he may pay or incur; but the five per cent. to include all other commissions:" That is a stipulation for the benefit of Benjamin Wood, and a stipulation also in which Matthew Wood and Philip Wood, and Rowe, were interested.

This instrument, which is dated on the 27th of May 1818, is signed by Benjamin Wood for himself, and Matthew and Philip Wood, and by Joshua Rowe. The plea, stating the agreement verbatim, avers, that Benjamin Wood was duly authorized and empowered to enter into and sign such agree-

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ment as agent for and on behalf of the defendant, and Matthew Wood ; and it is also averred, that by the proceedings in equity, which it is by the agreement stipulated should cease between the complainant, and Matthew Wood, and the defendant, were meant and intended the proceedings in the present suit ; and that, at the time when the agreement was entered into and signed, there were not any other suits or proceedings in equity between the said complainant and Matthew Wood, and the defendant, or either of them, than this present suit and the proceedings therein. Then it avers also, that the agreement has not been waived or determined, but is now subsisting and in full force ; and the defendant pleads the matters aforesaid in bar to the bill of complaint, and the relief and discovery thereby sought.

This plea is in effect a plea of one part of the agreement ; that part which provides that all proceedings in equity should cease between Joshua Rowe, and Matthew and Philip Wood, in bar of the whole bill. It is therefore a plea, the object of which is to prevent any further proceedings in the particular suit ; yet that was a suit which was not merely against Philip Wood, but a suit in which Matthew Wood was also a party. In deciding upon this plea and the effect of it, I must consider first what is the object of a plea to a bill in equity. The object of a plea to a bill in equity I take to be this, to reduce the subject of litigation to a single point, and to avoid that expense which would be incurred by entering into all the subject-matter of the dispute. This plea does not effect that purpose ; for this, which is made the sub-

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ject of plea, is an agreement which embraces several subjects of the suit, and provides for them in a different way from what they could be provided for under a decree in the cause which had been instituted. If, therefore, the court is to proceed upon this plea as a mode by which it is to do justice between the parties, how is it to act? Is it to stay all proceedings against Philip Wood? that will not execute the agreement; it will execute that one part of the agreement which provides that the proceedings instituted in equity shall cease, but it will not execute the other part of the agreement; and I apprehend it is impossible to hold, that any person can have a right to demand that one part of an agreement shall be executed, leaving the other part unexecuted; which consideration alone demonstrates that this agreement could not be a good plea to this suit.

But what is the nature of this plea? Without entering into the question, whether the averments are or are not sufficient, except that it is manifest from what has been stated, that the averments are not sufficient, because they do not inform the court that Benjamin Wood and Matthew Wood are ready to carry into execution this agreement, without which the agreement cannot be performed. If such a decree cannot be made, the plea does not enable the court to do justice between the parties, and therefore I conceive it cannot be a bar to this suit as it is pleaded. Independently of this objection, can it be contended that an agreement which binds three persons can be offered by one of those persons in bar of a suit which involves other persons? The court upon the hearing of the plea would have that party before it or

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part of the case, and other parties at the hearing upon another part of the case. It would be impossible for a court to act upon the agreement under these circumstances, unless it had also the means at the same time to compel the other two parties to perform that agreement, which it cannot do unless a bill is filed for the purpose.

It has been said this is a dilemma which Rowe, the Respondent in the bill, has brought upon himself by executing this agreement ; I say it is a dilemma which the Appellant also has brought upon himself by executing this agreement ; both of them have brought themselves equally into that situation. When the Respondent does not insist upon the execution of the agreement, and the Appellant does insist upon it, it lies upon the Appellant to take the steps necessary to have the agreement performed, and not upon the Respondent. That I conceive is also an answer to the plea, and shuts it out from being allowed as a good plea to this bill.

But there is another objection which appears to me important, and which of itself is an answer to this plea, and that is, that it is an executory agreement ; it is a ground of action, and I never yet heard that one cause of action could be pleaded in bar against another cause of action. Whether P. Wood has or has not a right to carry this agreement into execution must depend upon a variety of circumstances which cannot be in the contemplation of the court upon the hearing of this plea. In the first place the court would not have all the parties before it, and in the next place it would not have the point in issue as between Rowe and Philip Wood and

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Matthew Wood, and consequently it would be impossible for the court to act upon it in any way whatever.

It is said, why is this difficulty to be thrown upon Philip Wood since he is ready to perform the agreement? if so, he must file a bill in equity to compel the performance of it; the agreement gives him no other remedy. It gives him a right to file a bill for a specific performance, but no other right whatever; it is only that species of right which it confers, how then can that as a plea be a bar to the bill? It has been compared to a release; I apprehend it is a totally different thing. Taking it as in the nature of a release, it is only an agreement (as pleaded) for a release of all demands between Philip Wood and Rowe, and that could not be pleaded in bar to the whole relief. It might be pleaded in bar as to any account sought to be taken by this bill, so as to make Philip Wood responsible to Rowe, but it would not be a bar to the whole suit. The suit must proceed with respect to Matthew Wood; and as far as he might have a demand against Philip Wood, though derived from Rowe, the court must decree against all the parties: and the only effect of that decree would be, with regard to the result of the account, if any thing should appear to be due from Philip Wood to Rowe, Rowe could not have any remedy upon that if it should be so decreed. Therefore, if it had been a release, it could not be pleaded in bar; if it had been a release of all demands whatever, it could not be a bar to this bill, because it could not affect the rights between Rowe and Matthew Wood, and the rights of Matthew Wood as against Philip Wood.

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Under these circumstances, it appears to me that this is a case, not only in which this plea with the averments is not a good plea, because the averments are not sufficient; but that no amendment could make it a good plea, because it is not a proper subject of plea: it is a mere right of action which Philip Wood insists he has against the respondent Rowe, and that right of action can only be made available by that mode of proceeding by which a right of action can be made available, that is, by producing it in the proper course of suit. It cannot be a bar to another suit which has been instituted by the party against whom Philip Wood insists he has this right of action. Upon these grounds the order disallowing this plea ought to be affirmed.

The Attorney-General:—We trust your Lordships will allow the Respondent his costs of this appeal.

The Lord Chancellor:—We cannot allow the costs, because there have been opposite judgments.

The order for over-ruling the plea affirmed.

SCOTLAND.

JAMES DUKE OF ROXBURGHE - *Appellant;*

JOHN WAUCHOPE, Writer to the Signet, sole accepting Trustee and Executor of the deceased JOHN DUKE OF ROXBURGHE; and the Reverend Archdeacon CHARLES BAILLIE HAMILTON, second Son of the late Honourable GEORGE BAILLIE of Mellerstain; Sir WIL- LIAM SCOTT of Ancrum, Baronet, Son and Heir of the late Sir JOHN SCOTT of Ancrum, Baronet; and Sir HENRY HAY MACDOUGAL of Mackerston, Baronet, the Resi- duary Legatees appointed by the said Duke	} <i>Respondents.</i>
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LANDS, &c. being limited to heirs of entail by simple destination, a deed was executed in *liege poustie* in favour of the heirs general of the disponent after his death without issue, with a power to revoke or alter that disposition on death-bed; and a declaration, that so far as it shall remain unrevoked, and not altered by a writing under the hand of the disponent, it shall have the effect of a delivered evident, though, &c. By another deed, executed thirteen years after the first, all the lands, &c. together with the personal estate of the disponent, are vested in trustees in trust, to be sold, and the produce to be applied in payment of debts owing at his death, and legacies, &c. granted or to be granted, &c. (The objects of trust being different from those provided in the former deed) and the trustees are directed to convey, &c. the residue of the whole fund in favour of such persons, &c. as the disponent had directed or should direct by any writing executed, or to be executed, &c. On death-bed the disponent executes a deed of appointment, directing the trustees to convert the whole estate into money; and after giving cer-

tain legacies he bequeaths the residue to his heirs M. and E. for life, with remainder to other persons therein named; held, that this was not a revocation of the first deed so as to give to the heirs of entail a title to challenge the last deed *ex capite lecti*; although the disponees for life, under the second deed, being the heirs general of the disponent, had reduced the death-bed deed on that ground, and thereby, under the doctrine of approbate and reprobate, had forfeited the life-interest given to them by the second deed.

Where lands by an instrument in the nature of a will are disposed in trust to sell and pay certain legacies, and as to the residue for such persons as the disponent shall by writing appoint; and afterwards by deed made on death-bed he disposes of the residue, the law of death-bed applies to the case, and the disposition is reducible on that ground, so far as it relates to lands.

Lands (entailed by simple destination) being given by testamentary disposition to the sisters and heirs of the disponent, under obligation as to part of those lands, that they should be conveyed by his sisters to the heirs of tailzie, entitled by strict statutory entail to the principal mansion, &c. where the lands subject to the obligation are situated, on condition that a certain sum shall be paid by a certain day by those heirs to the sisters: by a subsequent testamentary disposition, consisting of two deeds, the latter being made on death-bed, the lands of the disponent, including those in question, are vested in trustees upon trust to sell and pay the interest of the produce to the sisters of the disponent for life, &c. who, as general heirs of the disponent, reduced the latter instrument so far as it regarded lands destined to heirs of line, as made on death-bed: held, that the heirs of entail have no title or interest to reduce the same instrument on the same ground as to the entailed lands; nor to call for a conveyance on payment of the sum specified in the condition; 1. because their interest is excluded by the *liege-poultie* deed, and is not restored, transferred to, or vested in them, because the disponees in that deed have forfeited or rejected their right under it; 2. because they must claim as disponees or legatees under that deed, and in such character they are barred from challenging the death-bed deed; 3. because in the events which

had happened they could not fulfil the conditions on which alone the benefit of the disposition could be claimed ; 4. because they are not entitled to avail themselves of the right of redemption according to the condition, and under the obligation imposed on the disponees in the first deed, inasmuch as that obligation does not extend to the trustees who take under the death-bed deed.

JOHN Duke of Roxburghe, in 1790, executed a deed by which he disposed to himself, and the heirs whomsoever of his body, whom failing, to Lady Essex Ker, and Lady Mary Ker, his sisters-german, &c. and the heirs whomsoever of their bodies, &c. and failing both his said sisters and the heirs of their bodies, then to his heir of tailzie, having right for the time to his earldom and estate of Roxburghe, &c. whom failing, to his own heirs and assignees whomsoever, all his unfettered estates, comprising lands destined to heirs of line, and lands descendible to heirs of tailzie, by simple destination, &c. except certain lands in the parish of Kelso, as to which it was provided and declared in manner following, “ that “ the said Lady Essex and Lady Mary Ker, and “ their foresaids, shall be obliged to *dispose* and “ *convey* to the heirs of entail, having right for the “ time to my said tailzied lands and estate of Rox- “ burghe, and to the heirs of tailzie and provision, “ succeeding to them in my said tailzied estate, in “ terms of the rights and investitures thereof; but “ also with and under the conditions, provisions, “ restrictions, limitations, and clauses irritant and “ resolute, contained in the said rights thereof; “ all and whatever lands and heritages within the

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“ parish of Kelso, presently belonging, or which
 “ may belong to me at my death, and not subject
 “ and liable to the limitations and restrictions in
 “ the entail of the Roxburghe estates; but with
 “ this provision always, that such heir of entail shall,
 “ at either of the two first terms of Martinmas,
 “ which shall be next after my death, make pay-
 “ ment to my said sisters, and their foresaids, of the
 “ sum of 3,000*l.* sterling, or such other sum as I
 “ shall appoint; and shall also discharge them of
 “ all claims whatsoever, which they may have against
 “ my representatives, for the price of teinds sold by
 “ me, the exchange of lands, or on any other cause
 “ or pretence whatsoever; declaring, that if my un-
 “ entailed lands and estate in the parish of Kelso,
 “ shall not be redeemed in manner foresaid, by my
 “ heir of entail, at either of the two first terms of
 “ Martinmas, next after my death, the same shall,
 “ from thenceforth, remain with and belong to my
 “ said sisters and their foresaids, heritably and irre-
 “ deemably in all time coming.”

All former dispositions and settlements of his
 said lands, estate, and effects, are then expressly
 revoked, and the deed concludes with the following
 clause: “ And as I reserve full power and liberty
 “ to myself, at any time in my life, and even on
 “ death-bed, to revoke or alter these presents, in
 “ whole or in part, and to sell, burden, or otherwise
 “ dispose of the whole estate, heritable and move-
 “ able, hereby disponed, or any part thereof, so I
 “ dispense with the delivery of these presents, and
 “ declare that the same, in so far as not revoked or
 “ altered by a writing under my hand, shall have

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“ the effect of a delivered evident, though found in
 “ my own repositories, or in the custody of any
 “ other undelivered at the time of my death.”

On the 5th of November 1803, Duke John executed a new settlement in the form of a trust disposition and nomination of executors. By this deed, he vested the whole of his unfettered lands, together with all his personalty, in the Respondent, Mr. Wauchope, and other trustees, upon trust, to sell the whole or any part of his real estate, &c. at their discretion, and apply the produce in payment of debts, legacies, &c. given or to be given, &c. The final trust is thus expressed : “ The whole residue, “ remainder, and surplus of my said estate and “ effects, shall be conveyed and made over, or “ applied and employed by my said trustees or “ trustee acting for the time, to and in favour of “ such person or persons, or for such uses and purposes as I have directed, or shall direct, by any “ deed, missive, memorandum, or other writing, “ executed, or to be executed by me for that effect, “ at any time of my life, and even upon death-bed.”

Of the same date, he executed a memorandum relative to the said trust-deed and settlement, whereby he desired it to be understood by his trustees, in case he should be prevented from executing such a deed of appointment as he had alluded to, that it was his wish and intention that the disposition and settlement of 1790 should stand good as far as regarded his sisters the Ladies Ker.

On the 19th of March 1804, Duke John, when upon death-bed, executed a deed of appointment or instructions to his trustees. By this deed he directs them to sell his real and personal estates, and to

Deed of instructions of
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apply the produce in payment of certain legacies ; and after investing the residue, to pay the interest to his sisters the Ladies Essex and Mary Ker, and the survivor ; and after the death of the survivor, he directed that the residue should be paid, in certain specified proportions, to the Respondent the Reverend Charles Baillie Hamilton, Sir John Scott, the father of the Respondent, Sir William Scott, and to the other Respondent, Sir Henry Hay Macdougall.

The arrangements made by this deed, as well as by the trust disposition, were in many respects materially different from those of the settlement which had been made in 1790, but neither of them contained any express revocation of that settlement.

Duke John dying without issue, the disposition as to the unentailed lands was reduced by judgment of the Court of Session at the instance of the Ladies Ker, in their character of heirs of line to the disponent.

Duke John was succeeded in the entail by Duke William, who did not challenge these settlements.

Duke William was succeeded by the Appellant, James Duke of Roxburghe, who brought an action of reduction and declarator to set aside these settlements. The summons recites the title of the pursuer as heir of entail, and the before-mentioned deeds, and concludes, 1st, that it ought to be found and declared that “ John Duke of Roxburghe did, “ by the execution of the deed of the 19th of March “ 1804, effectually revoke and recal the foresaid “ deed or instrument executed by him in *liege* “ *poustie*, on the 14th day of October 1790, as “ well as the foresaid writing or memorandum of

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“ date the 5th of November 1803, purporting to be
 “ a direction to the trustees named in the trust-deed
 “ of the same date, in so far as said deed or instru-
 “ ment of 14th October 1790, and memorandum
 “ of 5th November 1803, or either of them, was or
 “ were prejudicial, or intended to be prejudicial, to
 “ the heirs of the entailed estate of Roxburghe, or
 “ to their claims to any lands or rights destined to
 “ them by prior rights and investitures thereof, and
 “ to the pursuer in particular.” 2d, That the deed,
 of the 19th of March 1804, be set aside, “ because
 “ the said deed, instrument or writing, was by the
 “ said Duke made and signed at a time when he
 “ was upon death-bed, labouring under the disease
 “ of which he died a few hours after, and when, by
 “ the common and statute law of this realm, he was
 “ incapable of making any deed to the prejudice of
 “ the pursuer, as heir of the investitures of the said
 “ lands. 3d, That at least, and in every event, and
 “ although it should not be found and declared, and
 “ although decret should not be pronounced in
 “ manner above mentioned, yet the said death-bed
 “ deed of the 19th of March 1804 ought and should
 “ be cassed, reduced, annulled, decerned, and de-
 “ clared in manner, and for the causes and reasons
 “ foresaid, to be and to have been void and null, so
 “ far as concerns the lands situated in the parish of
 “ Kelso, which belonged to the said John Duke
 “ of Roxburghe, whether destined to his heirs of
 “ entail or not, and to which, in virtue of the said
 “ *liege poustie* deed of 1790, the pursuer and other
 “ heirs of entail had a right, and were entitled to
 “ succeed, upon payment of 3,000*l.* and fulfilling

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“ the other conditions of the deed in manner particularly before mentioned.”

In this action, the Ladies Essex and M. Ker, the Respondent Wauchope, the only trustee who accepted and acted in the trusts of the deeds of 1803 and 1804, and the Respondents the residuary legatees were called as defenders. No appearance was made for the Ladies E. and M. Ker ; but the Respondents having put in defences, and the case having been discussed before Lord Alloway, Ordinary, the following interlocutor was pronounced :—

Interlocutor of
the 18th Feb.
1814.

“ The Lord Ordinary having considered the mutual memorials for the parties, and the whole process, finds, that John Duke of Roxburghe, when *in liege poustie*, conveyed his whole unentailed subjects of every description to Lady Essex and Lady Mary Ker, his sisters, and their heirs in fee-simple ; but with a destination, upon the failure of his sisters and their heirs, to his heirs of entail, and with a power to revoke and alter that deed, even on death-bed ; finds, that the heirs of entail, in so far as they were the heirs of investiture of any parts of these lands, were completely excluded by that *liege-poustie* deed, in favour of his sisters ; finds, that Duke John afterwards executed in 1803 a conveyance of his whole heritable subjects, not limited by the entails, to John Wauchope and James Dundas, as trustees for the purposes therein mentioned ; finds, that upon the 19th March 1804, John Duke of Roxburghe, when upon death-bed, executed a deed of instructions, directing the trustees to distribute

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" his whole heritable and moveable property, by
 " paying certain legacies, and dividing the residue
 " of his fortune among certain residuary legatees ;
 " finds, that the right of challenging upon the head
 " of death-bed, is only competent to the next heir
 " of investiture having an interest, and who, in virtue
 " of the death-bed deed being set aside, would suc-
 " ceed to the lands and heritages therein contained ;
 " finds, that if the death-bed deed in question were
 " set aside, the deed 1790, which is not expressly
 " revoked by the death-bed deed, must exclude the
 " succession of the heirs of entail ; and that the
 " pursuer, James Duke of Roxburghe has no in-
 " terest, as the heir of investiture, to insist upon
 " the reduction of the death-bed deed 1804 ; and
 " therefore assoilzies the defenders from the general
 " conclusions of the reduction : And with regard to
 " the particular conclusions, as to that part of the
 " lands situated in the parish of Kelso, the investi-
 " ture of which formerly stood to the heirs of entail,
 " but which were again conveyed by the deed 1790
 " to the Duke's sisters, and which deed contains
 " an obligation upon his sisters to convey these
 " lands to the heir of entail, for the time being,
 " upon his discharging them of all claims whatso-
 " ever against them, as the Duke's representatives,
 " and making payment to them of 3,000 l. sterling,
 " at either of the two first terms of Martinmas, next
 " after his death ; finds, that the right to these
 " subjects was actually conveyed to his sisters ; and
 " that therefore the right and interest of the pursuer
 " as heir of investiture, to challenge the death-bed
 " deed in 1804, was expressly excluded by the deed

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WAUCHOPE.

“ in favour of Ladies Mary and Essex Ker in
 “ 1790; finds also, that the pursuer has no right
 “ to challenge the deed in question *ex capite lecti*,
 “ as to these lands, and assoilzies the defenders, and
 “ decerns.”

Interlocutor of
 the 11th July
 1815.

A representation was given in by the Appellant against this judgment; upon advising which with answers, the following interlocutor was pronounced :
 “ The Lord Ordinary having considered this representation, and the answers thereto, together with
 “ the whole process, refuses the representation, and
 “ adheres to the interlocutor complained of, in so
 “ far as relates to the general findings; but with
 “ regard to the alternative conclusion, as to the
 “ lands in the parish of Kelso, appoints the cause
 “ to be enrolled, and parties to be heard further
 “ upon this point; and particularly desires that the
 “ interlocutors in the process, which formerly depended before Lord Balgray, be produced in process; and that the pursuer shall also particularly
 “ condescend upon these lands in the parish of
 “ Kelso, as to which the investitures formerly stood
 “ to heirs of entail.”

Interlocutors
 of the 14th
 Feb. 1816.

The Appellant represented against this judgment. The Lord Ordinary appointed the representation to be answered, and ordained a condescendence to be lodged on the special point, respecting the lands in the parish of Kelso. Thereafter, on advising these papers, the following interlocutor was pronounced : “ The Lord Ordinary having considered this representation, and the whole process,
 “ after having heard parties, refuses the representation, and adheres to the interlocutors complained

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“ of;” and of the same date he pronounced this other interlocutor, as to the lands lying in the parish of Kelso: “ The Lord Ordinary having again resumed consideration of this process, with regard to the lands lying in the parish of Kelso; in respect that the former investiture of these lands, in so far as it stood in favour of the heir of entail, was altered by the deed 1790, executed by John Duke of Roxburghe, *in liege poustie*; and that the representor cannot claim any benefit from that deed without being subjected to all the conditions contained in it, as a disponee or legatee, in which character he was barred from challenging the death-bed deed in question; and as he cannot now fulfil the conditions on which alone he could claim the benefit of that deed, refuses this representation, and adheres to the interlocutors complained of.”

The Appellant petitioned the Court of the first 4 July, 1816. division against these interlocutors; but the Lords adhered to the interlocutor reclaimed against, in so far as it finds that the pursuer is barred by the deed of 1790 from challenging the death-bed deed of 1804, and that he has no right to challenge that deed *ex capite lecti*, as to any lands to which he would have had right as heir *alioqui successurus*; and further find, that the pursuer, the Duke of Roxburghe, is not entitled to avail himself of the right of redemption of the Kelso lands contained in the deed of 1790, inasmuch as the obligation therein contained is not imposed on the defenders by the death-bed deed, under which they take these lands.”

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13 Dec. 1816.

Another petition was presented to the same division, but the Court adhered to the interlocutor.

From these several interlocutors the Appeal to Parliament was presented.

For the Appellants, *Mr. C. Warren* and *Mr. Wetherell* :

The first question is, whether an implied revocation is sufficient to destroy a deed executed in *liege poustie*? By principle of law a subsequent deed, which is inconsistent with a prior deed, effects a revocation; so in the same instrument the last provision, and in different instruments the last in date, is operative and destroys the former. The deed of 1804 is explanatory and directory, and taken with that of 1803 they give the subject-matter to new disponees, and thereby declare that the dispositions of the deed of 1790 are altered. In the English law, which stands on the same principle, where the donee of a power alters the uses before limited, it is a revocation in law. So where a testator makes a later will inconsistent with an earlier will, it is an implied revocation*. According to these principles the deed of 1790 is revoked by the deed on death-bed, which is void for every other purpose but that of revocation. So by the law of England, and in principle, a subsequent will or instrument which is void for informality, or ineffectual on account of the incapacity of the devisee or donee, effects an implied revocation; as a devise to A. and afterwards to the poor of the parish, or to a corporation, or a papist; the second devise is void, and the first revoked.

* *Powell on Devises*, vol. 2, p. 132.

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It is said to be inconsistent to suppose the deed invalid as made on death-bed, and yet to use it as a valid deed for the purpose of revocation; but it is used as showing the intention to revoke, and is efficient for no other purpose. Thus where a devise was made to B. and afterwards the devisor by deed poll granted the lands to his wife, that grant was held void. But although nothing passed by the deed, it was held to be a revocation*. So it is in the case of a feoffment without livery, and a bargain and sale not inrolled†.

An implied revocation is as powerful in law as an express revocation. By the law of Rome and of England as to personalty, a will is revoked by a second will inconsistent with it. The law stands on the principle of presumed intention, and is equally applicable to land. The authorities on this point, from the civil law, which is the fountain of the law of Scotland, are decisive‡.

The failure or non-existence of the heir named in the last testament does not annul it as a will, and restore the former will§. If, indeed, no heir is

* *Beard v. Beard*, 3 Atk. p. 72.

† 1 Roll. Abr. 615, Vin. Dev. (P.) pl. 6, 3 Atk. 803. So an incipient act not perfected, as the making a tenant to the præcipe towards suffering a recovery without further proceeding, revokes a will. See *Harmood v. Oglander*, 6 Ves. 199; and formerly the grant of a reversion without attornment had the same effect.—See Wentw. Off. Ex. 22.

‡ Heineccius ad. Inst. § DLXXXIII. ad. Pandect. vol. 2, p. 11. §. 30; (L. 1, l. 2, ff. § 2, § 7. Inst. h. t. l. 27, *C. de Test*)—(L. 4, ff. *De Adim. Leg.*)—(L. 6, § 2, ff. *De Jure, Codicill.* § 2, Inst. L. 16, ff. h. t.)—L. 27, *C. de Testam.*)—(L. 1, § 6, ff. *De bon. poss. sec. tab.*)—(L. ult. ff. h. t.)

§ Heineccius, *qu. sup.* note to s. 30, L. 1. ff. h. t.

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named *, or an impossible heir †, or the latter will is void in law upon the face of it ‡, it has not the effect of revocation, because it is no will; but whenever it may have an operation which is disappointed, the effect is not merely to give a preferable right to the devisee under the second will, in failure of which the right of the devisee under the first will revives, but to destroy that right altogether.

So Voet § states the law to be, that although there must be a possibility of inheritance under the second will to make it effectual as a revocation, it is not necessary that the inheritance should vest. The former testament will be equally revoked, although the latter will is rejected by the heir named in it, or because he dies before the testator, or the condition of the gift fails ||. From which it follows, that a testament once revoked by a second testament remains void, although the later will is afterwards rescinded by law; and this is equally true where the second will is revoked by a subsequent event, as by the birth of a posthumous child ¶.

These instances are precisely similar to the case of revocation by the event of death within the time limited by law. The deed is valid when made, but

* L. 11, ff. h. t.

† L. 16, ff. h. t.

‡ L. 16, § 1, ff. *De vulg. et pup. subst.*

§ Vol. 2, p. 288, lib. 28, tit. 3, s. 5.

|| Inst. quib. mod. infirm. test. 16, ff. h. t.

¶ L. 12, § 1. ff. de bonor. possess. contra tab. or where the testator destroys the latter will with a view to make the former valid, as being the last will in existence. *Heinec. ad Pandect. Pars. v. § 32.* But in this doctrine the civil law appears to differ from the law of England where the latter will has not expressly revoked the former. *Semb. See Goodright v. Glazier, 4 Burr. 2512. Peck. 210, 44. Ass. pl. 36. M. 44. Ed. 3. 33. Doug. 40. Burtenshaw v. Gilbert, Cowp. 49.*

becomes invalid by a subsequent event. A disposition of heritage, intended to be in operation during the life of the disponent, and revocable until his death, is in the nature of a will, and regulated by the same principle of law.

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It is supposed that the rules of the civil law are inapplicable, because the case relates to death-bed ; but the true point in question has nothing to do with the law of death-bed, which is peculiar to Scotland ; but to the effect of a later deed or will as to revoking a former deed or will, and this question of revocation is not peculiar to the law of Scotland, but is a point of general law and of the civil law, as the foundation of the law of Scotland.

By that law a second testament annuls the first, and makes it ineffectual *. It is a revocation, and not a conditional substitution. So with respect to a legacy given to a different person by a posterior will †, the right cannot revive in the first legatee by the event of the death of the second. Bankton ‡ on the subject of implied revocations, says, “ voluntary “ alienation of the thing bequeathed, or willingly “ uplifting a bond, and not employing, will infer “ revocation. But it is otherwise if the alienation “ was necessary, or the debtor forced the payment, “ and the money was re-employed on a moveable “ security. In this the testator will be presumed “ only to have been exercising lawful acts of administration, but not to have intended to prejudice “ or recall the legacy. A transfer of the legacy “ from one to another, &c. will infer a virtual re-

* Ersk. Inst. B. 3, tit. 9, s. 5.

† Stair, Inst. B. 3, tit. 8, s. 3.

‡ B. 3, tit. 8, s. 53.

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“vocation.” So Erskine* says as to legacies, special and general, “they may be revoked by posterior “derogatory deeds, or general dispositions.”

The deed in question contained an express power of revocation, but *mortis causa* deeds are revocable in their nature; and whether they relate to real or moveable property, in this respect is immaterial; for the question turns upon the intention of the testator or disponent, to be inferred from his acts.

But the case is supposed to be concluded by authority, and the Respondents admitting that it may be difficult, on principle and by reason, to support the law as they represent it to be, contend that it is settled by decision, and not now disputable. To support this position they cite the cases of *Irving v. Irving*†; *Finlay v. Birkmire*‡; *Alexander Telfer*§; and *Rowan v. Alexander*||.

But the cases are not applicable to the question; for in the first it was merely decided, that a death-bed-deed renewing a previous disposition in favour of the same disponent, as the previous *liege poustie* deed did not operate as a revocation. No question was raised, as in this case, whether an implied was not equal to an express revocation; and whether such revocation was not effected by a subsequent deed altering the disposition of a preceding deed. In *Finlay v. Birkmire* the revocation was express, and therefore not applicable to a question of implied revocation. The case of *Alexander Telfer* is not reported, but

* B. 3, t. 9, s. 6.

† Nov. 1738, Kilk. Voce Death-bed, p. 145.

‡ Fac. Coll. July 29, 1779.

§ Not reported. July 14, 1806. See the report of *Craufurd v. Coutts*, in the note at the end of this case.

|| 22d Nov. 1775, D. P.

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according to the account given by the Respondents, it was similar to the case of *Irving*; the death-bed deed being a renewal of the disposition in favour of the same party, as in the *liegè poustie* deed, it was held not to be a revocation either express or implied.

As to *Rowan v. Alexander*, it is a single case, decided upon a difference of opinion; it is contrary to principle, and has not been followed in practice. The Respondents suppose it has been confirmed in the case of *Coutts*,* but the fact is otherwise. It was a case of express revocation, and Lord Loughborough in moving judgment, alluding to the case of *Rowan v. Alexander*, said, he did not agree with the Court of Session in the distinction made by them in that case between express and implied revocation. According to the opinion of Lord Loughborough, expressed in the case of *Coutts*, a second disposition, inconsistent with the first, operates *per se* as a revocation. Being of this opinion, he could not have thought *Rowan v. Alexander* a correct decision. In the same case of *Coutts*, Lord Eldon said, “he concurred with Lord Rosslyn, that it “would have been impossible for him, on appeal, to “have acceded to the judgment of the Court of “Session, in the reversing of the decision of the Lord “Ordinary in *Rowan v. Alexander*.” The authority of the case is impeached by these judicial observations; it has been followed by no similar judgment, and is not supported by the practice of the courts or of conveyancers. When the case of *Craufurd v. Coutts* again came before the House in

* *Craufurd v. Coutts*, D. P. 1799. See the note at the end of this case.

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1806, the decision in *Rowan v. Alexander* was again disapproved by Lord Eldon; but he said, if titles rested upon the authority of the case, it ought not to be disturbed. So that the date of the decision (1775) seems the only difficulty impeding reversal and the only ground for supporting it.

If the words "I revoke," had been used by the disponent, the revocation is admitted, although the deed is reduced on the head of death-bed. But is there any peculiar virtue in these words, surpassing the effect of an act of revocation done in pursuance of a preconceived intention? A power to revoke being previously reserved, a new disposition is made, giving the lands to new disponees. How a revocation can be more effectually made it is difficult to conceive. The act itself is conclusive to show the intention of the disponent; and in addition to this, the memorandum signed after the execution of the first deed of trust shows that the deed of 1790 was considered by the Duke as revoked. For on no other supposition could it be necessary to provide, as he does, by the memorandum, that the deed of 1790 should remain effective, if he should make no appointment under the powers of the trust-deed.

In that memorandum the power is expressly recited, the future exercise of the power is contemplated, and upon the supposition that the general deed of trust operates as a revocation, a provision is made to counteract that effect. The deed in *liege poustie* is therefore by implication revoked, and does not interfere with the right and title of the Appellant to reduce the deed made on death-bed, which, though void in law, may be used to show the intent

to revoke. These propositions are borne out by authority*.

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2. The deed in question cannot interfere with the right of the Appellant, because it became ineffectual by the rejection of the disponees in that deed. The right of the heir to reduce a deed on death-bed cannot be taken away by a deed in *liege poustie*, unless a valid right is thereby constituted in some third person, and made effective by acceptance. A deed merely disinheriting the heir, or made in blank to be filled up in *lecto*, is inoperative. The former case is self-evident; the latter is decided by the case of Pennycook†; although it appeared in evidence that the testator, being in *liege poustie*, had declared that he intended to fill the blank with the name which was inserted in *lecto*. So, in a case where the name of the disponee had been inserted in *liege poustie*, but in a blank left at the time the domicile was afterwards added on death-bed, the disposition was held incomplete and ineffectual to exclude the heir from challenging the deed on death-bed‡. So deeds executed in *liege poustie* in favour of the heir, with a power reserved to revoke and redispone on death-bed, do not exclude the title of the heir to reduce; because no effective right is established in a third person, and the power reserved is a fraud upon the law: it is the assertion of a faculty and judgment to dispose on death-bed, which the law denies. If such reser-

* *Moore v. Moore*, Phill. Rep. 412; and cases there cited.

† *Fount. Jan. 18, 1687*. See *Brudenell v. Boughton*, 2 Atk.

‡ *Buchanan*, 1683. *Harcarse, Lectus Egritudinis*, p. 182.

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uations were permitted the law would be futile, for every heir might contrive his own law, to enable him to dispose on death-bed *. It can make no difference whether the cause of this inefficiency is original or supervenient. A disposition is equally ineffectual whether to an actual Jew, or a person who becomes a Jew ; to a person actually attainted, or who becomes attainted, before the death of the disponent. So a gift to an alien, or any person incapable of taking the estate, is void ; and it is immaterial whether the gift with a power of revocation be to a person originally incapable, or afterwards becoming so ; or to a person capable, but having such right in opposition to the deed ; or where the gift is subject to such conditions, that a rejection of the gift is the sure consequence. A *liege poustie* disposition, subject to legal objection, does not destroy the interest of the heir to reduce the deed on death-bed. In what respect can the case of legal objection, which prevents the existence of an interest to bar the title of the heir, be distinguished from the rejection of an interest by which it is equally annulled.

3. If the deed of 1790 is not revoked, the appellant may reduce the death-bed deed for the purpose of claiming the lands of Kelso. It is objected that by the former deed he is barred from challenging the latter. That might be so, if the disposition were made to a stranger ; but the ancestor cannot, by this contrivance, take away the right of an heir *alioqui successurus*, to challenge the deed on death-bed.

The Ladies Ker, to whom the lands of Kelso

* *Hepburn v. Hepburn*, 25 Feb. 1663. *Stair. Davidson v. Davidson*, 17 Nov. 1687. Fountainhall.

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were given, as trustees, with a beneficial condition, have rejected the gift, and their rejection is recorded by the judgment. The lands, therefore, devolve to the persons for whose benefit they were given, free from the condition, and as if the disposition to the Ladies Kerr had never existed; or supposing that, under these circumstances, the lands are not disposed of, the Appellant claims them as heir of tailzie. It is said he cannot approbate and reprobate, but as heir of tailzie he seeks only to reprobate. If it is to be considered as a gift to the heir, on the rejection by the conditional disponces, taking under the *liege poustie* deed as heir, or by paramount title, he may reduce the deed on death-bed. Considering that deed as a conveyance to the Ladies Ker, it is to them as trustees for the Appellant, as heir of entail. So it is put by the Respondents themselves, in their pleadings in the court below. In their condescendence they broadly argue, that it is in substance a disposition in favour of the heirs of entail; and so it was held by the two successive judgments of the Lord Ordinary (Balgray), who pronounces the deed of 1790 to be a settlement in favour of the heirs of entail. Whether the conditions of the conveyance are to be fulfilled, and in favour of whom, are different questions, which may be discussed afterwards in a different proceeding.

The objections as to the Kelso lands; that the condition is not imposed on the disponces in the death-bed deed, and that it contains no disposition in favour of the heirs, must be admitted as facts; but the question of law returns, whether the heir is not entitled to reduce the death-bed deed? A gift

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by *liege poustie* to an heir, or a trustee for the heir, or to him through the medium of a stranger, upon any condition, does not destroy his right to challenge a death-bed deed. If a gift to any other person, on condition to convey to the heir, with a power of revocation, defeats the right of the heir, the law of death-bed is futile, as being open to the plainest evasion. As to the objection, that the conditions imposed in the conveyance exclude him, and particularly, that the estate is to be conveyed subject to the fetters of the entail of Roxburghe : what is to prevent his fulfilling the conditions, if necessary, and taking the estate as heir *quasi* beneficial disponee ? A right in the heir to redeem lands, or a right to lands subject to a burden, may be less in quantity or degree, but in quality is the same as an absolute right, and equally protected in favour of the heir by the law of death-bed. The death-bed deed is equally to his prejudice, whether he is to take as heir or disponee, and whether it be directly, or through the intervention of the Ladies Ker, or the Respondents, as their substitutes. In the case of a wadset the redeemable right is vested in the wadsetter ; but the ancestor cannot dispose the lands on death-bed to the prejudice of the heir ; nor is he excluded from redemption, because he cannot be served as heir, but must take by reconveyance.

It is objected, that as to the Kelso lands, the Appellant in his summons founded on his right, under the disposition of 1790 ; but he founded mainly on his right as heir of investiture, a right which appears on the face of that deed ; and if the fact were as contended, the rules of Scotch

pleading do not exclude a party founding upon a deed in his summons, from abandoning that ground in court, and claiming as heir. The disposition of lands subject to redemption, if it is contended, makes the heir a disponee, and that the right of redemption is personal to the heir, which right he cannot exercise without acknowledging the validity of the deed under which he takes. But the disposition only qualifies the right of the heir, still leaving to him that character; the right of redemption is real in the heir, as by the exercise of that right he is reinstated in his inheritance. The objection, that the condition was to be performed after the Duke's decease, within a time which is past, and that it cannot now be performed, is too technical and too inequitable to be maintained. The question has been under litigation ever since the Duke's death, and no payment could be made till the death-bed deed was reduced.

For the Respondents:—*The Attorney General* and *Mr. Clerk.* *

The lands which are the subject of controversy were settled by simple destination, without fetters, upon the heirs of entail of the Roxburghe family. These lands were given by the deed of 1790, a deed *inter vivos* to the Ladies Ker, upon conditions; one of which is, the power reserved to revoke and alter. That power existed without reservation; but the clause dispensing with delivery is considered necessary where the author intends to keep the deed in

* Since raised to the Bench of the Court of Session, under the title of Lord Eldin.

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his repository; and, according to the general opinion, a deed is ineffectual without such clause, if not delivered. The deed of 1790 remained in force and unaltered until the execution of the deed of 1803, whereby a new disposition is made of the estate, so far as it is thereby vested in trustees. The beneficial interest might not ultimately have been affected by that deed. It is by the deed of 1804, operating upon the trusts of the deed of 1803, that the estate is destined to the Respondents, the beneficial devisees. The question arising out of this state of facts is one purely of Scotch law.

Arguments drawn by analogy from the law of England are dangerous to be applied in deciding on questions of the law of Scotland. By the law of Scotland, a person possessed of an hereditary right, without fetters, has power to dispose in *liege poustie*; he may reserve a power of revocation on death-bed. It is admitted that by the same law a person cannot on death-bed dispose of heritable property to the prejudice of his heir.

The Duke of Roxburghe had complete dominion over the property in question, of which he made a disposition by the deed of 1790. If this had been the only instrument executed by him, it is not disputed by the Appellant that it would have been a good disposition. By that deed he reserved a power to revoke on death-bed; by the deed of 1803 he gives the whole residue of his estate and effects, consisting of realty and personalty, in trust for such persons and uses as he *had directed* or should direct by any deed thereafter to be executed.

It has been argued at the bar that this deed alone

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operated as a revocation of the deed of 1790. It was not so argued in the court below ; but that the deeds of 1803 and 1804 together so operated. If no death-bed disposition had been made, it is clear that the Ladies Ker would have been entitled under the residuary clause in the first of those deeds. For the deed of 1803 expressly refers to that of 1790 ; and it seems to be admitted in the proceedings below by the Appellant, that the deed of 1790 remained in operation, so far as it was not altered by that of 1803, until the execution of the deed of 1804. And such appears to be the right construction from a passage in the speech of the Lord Chancellor, in the case of * *Ker v. Wauchope*. It was lawful to revoke by a *liege poustie* deed, although not by a death-bed deed. The language of the deed of 1804 becomes important in considering whether it is or is not a revocation of the deed of 1803. The deed of 1804 is a deed of appointment or instruction to his trustees already named in the deed of 1803. By the deed of 1804 he gives to those trustees the power to sell the real and personal estates already vested in them by the former deed, and to apply the produce in payment of legacies, and upon the other trusts specified in that deed. So far is this from an intention to revoke the deed of 1803, that it is founded upon it, and the authority is derived from it. It is on this ground that the two deeds together are said to be a revocation of the deed of 1790.

To reduce a death-bed disposition, it must be to the prejudice of the heir, and no one else can ques-

* Ante, Vol. 1. p. 1. The passage is not reported. It probably occurred incidentally in stating the facts of the case.

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tion it. The law of death-bed was made in favour of the heir *.

If there has been a *liege poustie* disposition to a stranger, the heir at law cannot question the death-bed disposition; although on death-bed a disposition in favour of the heir may so far be made as to revoke a *liege poustie* disposition made against him †.

A party may by a *liege poustie* deed reserve a power to alter on death-bed. The arguments on the other side would show, that a death-bed disposition operates as a revocation of the *liege poustie* deed. *Rowan v. Alexander* is not the only, nor even the first case on the subject. It was both preceded and followed by others decided on the same principles. In *Ker v. Ker* ‡, a deed made partly in favour of a grandchild, the son of the second son of the disponent, was delivered by him *sub silentio* to a stranger. The disponent afterwards, on death-bed, required the depositary to redeliver the deed, and having obtained possession of it, delivered it to a notary, to whom he also gave two blank papers, with his signature, desiring him to fill up the one with a disposition to his second son, the other, with a disposition to the only daughter of his eldest son, who was dead. Upon these facts it was held, that the first delivery was conditional, and that the recalling was effectual, although made on death-bed; seeing thereby the heir had no prejudice, since, if the death-bed deed were reduced, the former *liege*

* Regiam Majest. Stair. Erskine's Princ. of the Law of Scotland.

† See *Craufurd v. Coultis*. Post.

‡ Stair. p. 474. 499. Dict. of Decis. 3250.

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poustie deed was set up. The dispoinee in the first deed could not challenge it, because that deed was made revocable* on death-bed, which is lawful as against all persons but the heir.

In *Craufurd v. Coutts* there was an interval during which the right of the heir at law revested in him. But where there is a virtual revocation there is no such revestment†. In *M'Kean v. Russell*, where a creditor having taken a bond payable to himself, if living, and after his decease to persons therein named as substitutes, with a power reserved to him at any time of his life to receive and discharge the same, without consent of the substitutes, exercised the power on death-bed by disposing the bond to persons not being either the substitutes or his heirs at law; this disposition being questioned, in an action of reduction upon the head of death-bed, it was argued for the heir, that the death-bed deed annulled the substitution, and revested his right; and although by the same act the subject was disposed to strangers, the alienation was ineffectual as against him, being done on death-bed. But these reasons of reduction were repelled by the court‡.

As to *Rowan v. Alexander*, it is said the property was but small, and the question not much discussed in the court below. The case was fully argued both there and in this house. The *liege poustie* deed in that case was most materially altered

* By implication under the circumstances of the delivery.

† *Ker v. Ker*, 9. s.

‡ Dict. of Decis. Death-bed, p. 3277.

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by the death-bed disposition. It is in almost every circumstance similar to the present case.

It is admitted that by a death-bed disposition the *liege poustie* deed may be burdened; what is that but a revocation *pro tanto*? *Rowan v. Alexander* was decided in 1775. Many estates are held upon the law as settled by that case.

It was followed by the case of *Donaldson* *. On

* *Donaldson v. M'Kenzie*, 20th July 1776. The case is not reported. The following is a short outline of the facts, pleadings and judgment:—John Donaldson, bookseller in London, adjudged certain subjects in the neighbourhood of Edinburgh as belonging to Alexander Thompson. In that process, Mrs. M'Kenzie of Redcastle, daughter of James Thompson, by a second marriage, appeared, and insisted that the subjects sought to be adjudged belonged to her, and to prove this to be the fact, she produced, 1st, A mutual disposition (1768) between her father and mother, disposing to themselves, and to Mrs. M'Kenzie and her heirs, their whole heritable and moveable estate. 2dly, A holograph deed, dated 13th Sept. 1769, by which James Thompson conveyed to her the subjects in question. 3dly, A trust disposition by James Thompson, with consent of his spouse, conveying his whole estate to trustees for certain purposes therein expressed. This trust disposition was executed *in lecto*, and Mr. Donaldson insisted that the trust deed should be reduced upon that ground, in as far as it was prejudicial to Alexander Thompson, the heir of his father. As to the holograph deed, Mrs. M'Kenzie could not prove its date; and of course it was held to have been executed *in lecto*. And lastly, with regard to the mutual disposition of 1768, Mr. Donaldson insisted that it was revoked by the trust disposition.

Lord Monboddo, Ordinary, repelled this plea of Mr. Donaldson, who reclaimed to the court; putting his cause upon the following points:—"That both in law and in equity he is entitled, as creditor to the heir apparent, to insist, 1^{mo}, That "the mutual disposition and settlement founded on is effectually

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advising the petition in *Donaldson's* case, it was refused without answer, on the ground that the death-bed disposition was not to the prejudice of the heir.

The case of *Craufurd v. Coutts* was decided on the ground that an *express* revocation revested the right in the heir, and then the death-bed deed was to the prejudice of the heir. The Lord Chancellor in that case held*, that at the time of the death-bed disposition there was no effectual *liege poustie* deed in existence.

“ ally revoked by the trust disposition; and 2^{do}, That he is
 “ entitled to reduce the said trust disposition *ex capite lecti*,
 “ without giving effect to the former deed; or in other words,
 “ to use the trust disposition to cut down the former settlement,
 “ and thereafter to reduce the same disposition as executed on
 “ death-bed.”

In support of the last of these propositions, Mr. Donaldson founded, at great length, upon the case of *Cunningham**; insisting that it was a well-founded decision; but, on moving his petition, the court was of opinion that the case of *Cunningham* was erroneously decided. Lord President Dundas and Lord Corrington said, that they knew the history of that cause very well; that before it came to be heard at the bar of the House of Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the interlocutor of the Court of Session was ill-founded; in consequence of which understanding the matter was compromised by payment of a large sum of money. When counsel were called to the bar the cause was not argued; but it was stated that the matter was made up, and that both parties concurred in wishing the decree to be affirmed. Upon which Lord Hardwicke observed from the woolsack, that the Respondent had done wisely in not risking a judgment, and thus the interlocutor was affirmed.

* See note at the end of the Case.

* *Cunningham v. Whiteford Falconer*, 10th June 1748.

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In the court below, Lord Gillies, in the discussion of the present case, said, as to the case of *Rowan v. Alexander*, "That even if wrong it ought to be upheld;" and he conceived "that there was a great difference between implied and express revocation." The term, "implied revocation," cannot properly be applied to this case: according to the law of England it always proceeds upon the supposition, that the grantor has power to grant. There is no case in which it has been held that a deed executed by a person having no power can be a revocation. By the law of Scotland, upon a deed *inter vivos*, such as the *liege poustie* deed in this case, a power being reserved to alter on death-bed, it could only be altered by express exercise of the power; and the execution of a subsequent deed, which is destroyed by legal challenge, was never in that law held to be such an exercise of the power. That implied revocations have the same effect in law as express revocations, is a doctrine contradicted by authorities in the law of Scotland, showing that parties whose interest it was to contend for that doctrine, and who must have succeeded if it had been well founded, never thought of resorting to it as an argument in support of their claims*. The distinction between express and implied revocations is established by the cases of *Rowan v. Alexander* and *Craufurd v. Coutts*†. On that point the Judges of

* See Kilkerran, p. 151, *Finlay v. Birkmyre*, 29th July 1779. Case of Telfer, Jan. 14, 1806.

† See also the opinion of Bankton, upon a case stated by him, B. 3. tit. 4. s. 49.

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the Court of Session, who delivered their opinions in this case, were unanimous.

There is no such head in the dictionary as implied revocation, and the term itself is foreign to the law of Scotland. The cases of *presumed* revocation are totally different ; as where a legacy is given, and the subject of the gift is afterwards disposed of otherwise ; or where a specific legacy is followed by a general disposition of all the funds, including that legacy : there it is rather a question of preferable disposition than of implied or even presumed revocation. If by law the disposer has the power on death-bed to substitute a new object of his bounty in the place of the *liege poustie* disponsee, how is that end to be effected ? According to the argument of the Appellant, on the doctrine of implied revocation, the attempt to make a new disposition operates to displace the right of all the disponsees, and gives the benefit to a party excluded by the author. Such a doctrine, if admitted, could only have the effect to prevent any disposition after a deed in *liege poustie*.

It is to be observed, that the deed of 1790 conveyed no right to the disponsee at the time of its execution. It was an undelivered deed, kept in the repositories of the author, and containing an express reservation of power to revoke. The effect of such a deed is suspended, both as to the heir and the disponsee, until the death of the author. In a testamentary instrument, the event of death operates as a delivery. If it be revoked, the right of the heir revives, or rather remains unaffected. But how is the power of revocation to be exercised ? Erskine *

* B. 3. tit. 8. s. 98.

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says, "Where it is *actually* revoked the heir may pursue reduction of any *subsequent* deed made on death-bed to his prejudice." By *actual* revocation can he mean *implied*, or any thing less than *express* revocation? The deed to be reduced must be subsequent to the revocation, according to the doctrine expressed in that passage, which excludes the notion of a revocation in favour of the heir by a deed which is intended to operate in favour of another object of the author's bounty. That in such case there should be an implied revocation is a contradiction in terms.

If the analogy of English law is to prevail, the question is decided by the case of *Goodright v. Glazier**, which is law, notwithstanding the case of *Moore v. Moore*†. A second will being cancelled sets up the first.

As to the cases from Rolle's Abridgment, they are on the ground that an alteration in the estate has taken place, which alters the seisin; so that, technically, the party has not the same estate. That rule of law depends on the words of the statute of wills.

The case in Cowper‡ was decided on the ground of express revocation, by one of the modes prescribed, and having operation according to the

* Burr. p. 2512.

† *Qua Supra*.

‡ *Burtenshaw v. Gilbert*, p. 49. In this case there were two parts of the first will, one of which being in the possession of the testator was cancelled; the other, being a duplicate, in the possession of a depository of the testator, was found uncanceled in the room where the testator died. The opinion of the court was, that both parts were cancelled by the cancellation of one.

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words of the statute of frauds. If the second will is to be reduced on the ground of incapacity in the testator, it cannot be looked at for any purpose whatever, and then the first instrument remains in operation. It comes under the principle of decision in *Goodright v. Glazier*.

In the cases of *Pennycook v. Thomson, Hepburn v. Hepburn*, and *Davidson v. Davidson*, there was no previous deed in *liege poustie* to exclude the heir. In the first the deed was signed blank, and filled up on death-bed with the name of the disponent.

If the gift were to a person incapable of taking, the case might be different; and if, even to a dying person, according to the extreme case put by the Appellant, a question might arise, whether such deed were not null and void, as fraudulent and fictitious? Cases of fraud are decided upon the peculiar ground of fraud.

If there have been no cases on implied revocation since the decision in *Rowan and Alexander*, it must be on the ground that the law is considered as settled. Here is no express revocation as in *Craufurd v. Coultts*, but on the contrary, a reference to the previous deed, which is evidence that the interest of the heir is cut off; and if revoked in any sense, can only be to the effect of transferring the estate and right to the new disponent. If implications are to prevail, there is, with other implications, an implied assignation to the *liege poustie* deed, to make the gift to the new disponent effectual.

It has been argued that the Ladies Ker having repudiated the deed of 1790, the title of the heir at

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law vests ; but there must be something to repudiate. They had not an absolute, but only a qualified and conditional right, subject to the power to alter on death-bed, which power was exercised by the testator ; and neither they nor the Appellant as disponees can question the death-bed disposition. They could only repudiate for themselves, not for other parties interested : as to them it is *res inter alios acta*. According to the state of law supposed in this argument, the death-bed donee and the *liege poustie* donee may, by collusion, exclude the heir ; or the heir, and the *liege-poustie* donee may, by a similar operation, exclude the death-bed donee ; and the effect of the author's bounty will depend upon the contrivance of the parties : but no such attempt has ever been heard of in the law. There is no ground for this doctrine of repudiation. The estate does not vest during the life of the disponent, and it requires no acceptance at his death, but vests immediately upon that event. In the Bargany case the party repudiated by an instrument duly executed. There must be, together with the repudiation, an investment of the right in another ; which in heritable rights, can only be effected according to the known forms of law. The deed executed on death-bed constituted a right preferable to the right contemplated by the deed of 1790 : that deed became accessory to the deed on death-bed, by the will and intention of the author, and the heir has no interest in the disposition. According to English law, if an estate is given to *A.*, with a condition to pay a sum of money to *B.*, *A.* may repudiate, but he cannot disappoint the legatee.

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By the deed of 1790, the Kelso lands are given to the Ladies Ker to convey to the heirs of entail, on payment of a certain sum on a given day. This confers no right upon the heir in his representative character. It is a privilege affecting the lands, whether entailed or unentailed. As heir of entail he could have no claim to unentailed lands; and, with respect to lands entailed by simple destination, he was excluded by the deed on death-bed. It is argued, that by the operation of that deed he is remitted to the right under the deed of 1790. But in what character is he to maintain that right? not as heir, but as disponent. The legacy of a right to purchase the lands was displaced by a subsequent disposition. By the deed of 1790, the heirs of entail were put out of the investiture of the lands. Suppose the disposition had been in favour of heirs of line, could the heirs of entail have raised a claim? To support such claim the heir must be a person who is deprived of the estate by the death-bed disposition. But in this case he was deprived by the previous deed of 1790. The claim must be supported on the ground that by the will they have a right as heirs of entail; but it is no right to the lands; it is a mere personal obligation on the Ladies Ker, the disponents. The offer was to be made within the time limited by the deed, which has not been done, and it is now too late.

The *Lord Chancellor* :—

[In the course and at the conclusion of the argument.]

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usually contain a power to revoke. It is argued that a revocation of the deed revokes the power, which is part of it. But unless the power is expressly revoked, no court can impute to the author of a deed the absurdity, that he means to revoke a power which he professes to exercise.

On the points as to the repudiation and the Kelso estates, the judges of the Court of Session having differed, it is necessary that those questions should be accurately considered. As to the question of implied revocation ; if we are to act on the maxim of *stare decisis*, the judgment cannot be disturbed. The deed in *liege poustic* reserves a power of revocation ; by making another disposition under the authority of the power, it must be supposed that the disponent intended to do something effectual ; and it cannot be implied that by the exercise of the power he meant to revoke it.

25 May. 1820. The *Lord Chancellor* :— Having looked carefully into this case, I can see no sufficient reason for saying that this judgment should be altered. It appears to me, upon the best consideration I can give to the case, that upon all the points controverted at the bar the Respondent is right.

Judgment affirmed.

WILLIAM MOODIE, an infant, the representative of Mrs. ELIZABETH CRAUFURD, otherwise HOWIESON, Widow, deceased, by the Reverend JAMES MOODIE, his father, and WILLIAM BEVERIDGE, Trustee of the said Mrs. E. CRAUFURD, } *Appellants;*

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THOMAS COUTTS, Esquire, Banker in London, *Respondent*.

BY REVIVOR.

COLONEL CRAUFURD, being possessed of the estates of Craufurdland and Monkland, in the county of Ayr, and of certain superiorities in the county of Renfrew, all of which he held in fee simple in the year 1771, executed a disposition of the estates of Craufurdland and Monkland in the following terms: "In favour of myself in diferent, and to the heirs male lawfully to be begotten of my body; whom failing, to Sir Hugh Craufurd of Jordanhill, baronet, and the heirs male lawfully begotten, or to be begotten of his body; which failing, to the heirs male lawfully begotten of the now deceased William Craufurd, merchant in Glasgow, my cousin; which failing, to the heirs male lawfully begotten of the also deceased John Craufurd, late surgeon in Glasgow, his brother; whom all failing, to my own nearest heirs and assignees whatsoever in fee, heritably, and irredeemably, all and whole, &c.

"Providing and declaring, as it is hereby expressly provided and declared, that notwithstanding the right of fee and property of the lands above disposed is hereby conceived and taken in favour of the heirs male of my own body; whom failing, to the heirs male of the several other persons before mentioned, substituted to them, and that heritably and irredeemably; yet, nevertheless I do hereby reserve to myself full power and liberty at any time of my life, *et etiam in articulo mortis*, to alter, innovate, annul, and make void these presents, either in whole or in part, and to infringe upon, or totally change the foresaid series of heirs, and course

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“ and order of succession above devised ; as also to wad-
 “ set, contract, debts, and grant heritable bonds or other
 “ securities upon the lands and others above disposed,
 “ as I shall think proper, and burden and affect the
 “ same to what extent I may see necessary ; and sick-
 “ like to sell, alienate, and dispose the hail foresaid
 “ lands or any part thereof, and in general to do every
 “ deed and exercise every act of property that any un-
 “ limited fiar by law can do ; and that without the
 “ advice or consent of the heirs male of my own body, if
 “ any there shall hereafter be, or of the other heirs male
 “ substituted to them in the order above mentioned, to
 “ be asked or obtained for that purpose ; as also not-
 “ withstanding any charter or infeftment that may have
 “ followed hereupon.”

This deed, which was executed by Colonel Craufurd in *liege poustie*, was not delivered to the disponees, or any person for them, but remained in the repositories of the disponent.

On the 13th of February 1793, Colonel Craufurd executed a deed by which he conveyed the estate of Craufurdland to the Respondent : “ For the love, favour,
 “ and affection I have and bear to Thomas Coutts, Esq.
 “ banker in London, and to the end that all disputes
 “ and differences which might arise upon my death
 “ touching the succession to my estate and means, may
 “ be obviated and prevented,” &c. After conveying the lands and estates of Craufurdland, and after providing for the payment of Colonel Craufurd’s debts, funeral expenses, and legacies, the deed declares that the Respondent and his heirs, succeeding in the estate of Craufurdland, shall assume and bear the surname and arms of Craufurd of Craufurdland.

The deed also contains a clause in the following words : “ And *I hereby revoke*, and recall all former dis-
 “ positions, assignations, or other deeds of a testamentary
 “ nature formerly made and granted by me, to whatever
 “ person or persons preceded the date hereof ; and
 “ particularly a deed granted by me in the year 1771,
 “ settling my estate upon Sir Hugh Craufurd of Jordan-
 “ hill, bart. and his heirs ; and I declare the same to be
 “ void and null, so far as these deeds are conceived in
 “ favour of the persons to whom they are granted, but to
 “ be valid and sufficient to the extent of the powers

“ therein reserved to me to revoke, alter, or innovate the
 “ same, to the effect only of making these presents
 “ effectual in favour of the said Thomas Coutts and his
 “ foresaid.”

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This deed also conveys to the Respondent the superiorities in the county of Renfrew, which were not conveyed to Sir Hugh Craufurd by the former disposition in the year 1771.

Colonel Craufurd died on the 10th February 1793.

Of the same date with the disposition of the lands of Craufurdland in the Respondent's favour, Colonel Craufurd executed a separate deed, by which, without communication with the Respondent, he conveyed to him the lands of Monkland, in consideration of a sum (not paid) of 5,000*l.* sterling, as the price thereof. As soon as Colonel Craufurd had executed these deeds, he wrote to the Respondent and desired him to send his bond for 5,000*l.* as the price of Monkland; and the Respondent accordingly, on the 18th of February 1793, executed a bond for that sum in favour of Colonel Craufurd, as the price of these lands, and sent it to his agent Mr. James Dundas, writer to the signet, to be exchanged for the disposition of Monkland. Colonel Craufurd died before that bond arrived in Scotland.

On the 17th May 1793, the Respondent was duly infeft in the lands of Craufurdland and of Monkland.

Afterwards Mrs. Howieson, who was the aunt and heir at law of Colonel Craufurd, (with William Beveridge, writer to the signet, her trustee) brought an action of reduction before the Court of Session in Scotland, for reducing and setting aside the disposition in 1771, in favour of Sir Hugh Craufurd, and the two deeds executed in 1793, conveying the lands of Craufurdland and Monkland to the Respondent.

The process of reduction came before Lord Stonefield, as Lord Ordinary, who, after hearing parties, took the cause to report; and on advising informations, the Court of Session pronounced the following interlocutor: “ Upon June 12, 1795.
 “ the report of the Lord President, in absence of Lord
 “ Stonefield, and having advised the informations for the
 “ parties, petition for the pursuers, and additional information for them, the Lords sustain the reasons of reduction in so far as they respect the superiority of the

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“ lands, in the county of Renfrew, contained in the charter, 12th February 1725, from the then Prince of Wales, as Prince and Steward of Scotland, and reduce, decern, and declare accordingly; repel the reasons of reduction, in so far as they respect the lands of Craufurdland, and others, contained in the disposition by the late Colonel Craufurd to the defender Thomas Coutts, of date 13th February 1793; assoilzie the defender, and decern: Find that the alleged sale of Monkland, set forth in the other deed of the same date, 1793, was an unfinished transaction; and remit to the Lord Ordinary to hear parties procurators further thereon, and to do as he shall see just; remit also to his Lordship, to hear parties procurators upon the claim competent to the pursuers under the disposition and tailzie 1719, and to do therein as he shall see cause.”

The disposition, so far as concerned the superiorities in Renfrewshire, was reduced, because these were not contained in the deed 1771; and the Respondent acquiesced in this part of the judgment.

The pursuers complained of this interlocutor, by a reclaiming petition, in so far as it sustained the conveyance of the lands of Craufurdland in favour of the Respondent, and prayed the court “ to reduce, decern, and declare in terms of the libel; and, secondly, to find that neither Sir Hugh Craufurd, nor any of the persons called by the deed 1771, have any right to the lands in question, but that the same belong to the petitioner as the just and lawful heir therein.”

Nov. 17, 1795. The Respondent put in his answer, and the court pronounced the following interlocutor: “ The Lords having advised this petition, and the additional petition, with the answers thereto, they adhere to the interlocutor reclaimed against, and refuse the desire of these petitions.”

Mrs. Howieson, and her trustee, appealed from the interlocutors of 12th June and 17th November 1795, in so far as they repelled the reasons of reduction respecting the disposition of the lands of Craufurdland. This appeal was heard at the bar of the House of Lords;

July 11, 1799. and on the 11th of July, 1799, Judgment was pronounced; “ Whereby it was ordered by the Lords Spi-
Judgment in the 1st Appeal. “ ritual and Temporal in Parliament assembled, that the

"cause be remitted back to the Court of Session in Scotland, and that the said court ~~do~~ rehear the parties upon the interlocutors complained of on the said appeal."

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In consequence of this remit, parties were heard in presence of the Court of Session, and memorials were afterwards ordered, upon advising which, this interlocutor was pronounced: "The Lords having resumed consideration of this cause, and in obedience to a remit from the Most Honourable the House of Lords, having again heard counsel for the parties upon the interlocutors complained of in the appeal to that Most Honourable House, and having advised the mutual memorials for the parties, they adhere to these interlocutors, assoilzie the defender from the reduction, in so far as concerns the lands of Craufurdland, and decern."

Feb. 3, 1801.
Interlocutor
appealed from.

Mrs. Howieson and her trustee also brought their appeal against this interlocutor, and the two former interlocutors pronounced in this cause, contained in the former appeal; and Mrs. Howieson having died, the appeal was revived in the name of the now Appellant, the infant, her grandson and representative.

On the 11th of July 1799, some time after the argument upon the first hearing in the House of Peers, Lord Rosslyn moved the judgment in the following terms:—

The *Lord Chancellor*:—The hearing at the bar upon this cause was had some time ago, and I have now to state the result of the opinion I have formed upon it. The more I have considered this case the more I have felt the difficulty and importance of it. I had the advantage of trying my own opinion by communications with persons conversant in the law of Scotland, who were present at the hearing, with a noble and learned Lord*, who perused the printed cases, and with a Judge of the Court of Session, who was not raised to the Bench when the judgment now appealed from was pronounced. I had verbal communication also with other persons, and I was favoured with the result of the opinions they had formed.

These opinions were not uniform. If they had all gone in one course I should have deemed that the safe mode

* Lord Thurlow.

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for you to have followed in determining this cause, though it had differed from my own sentiments. It is proper to state, that the learned Lord I alluded to concurs with me; and that our opinion is, that the judgment in the present case is contrary to law. At the same time he feels, as I myself do, much difficulty in a question purely of Scots law upon such opinions as we can form, to state it as advisable to reverse the judgment of the Court of Session.

I shall mention in a few words the nature of the present question, to show the importance of it, the grounds upon which the decision proceeded, and the nature of my doubts with regard to it; and I shall then submit what I conceive is proper to be done in the present case. *

The facts in the cause are short. Colonel Craufurd possessed an estate, which he destined by deed, several years ago, to Sir Hugh Craufurd, who was not his heir. This deed remained in Colonel Craufurd's hands undelivered; but if he had died without executing any other deed, no doubt the estate would have gone to Sir Hugh. He reserved a power, however, to alter the deed, in whole or in part, *et etiam in articulo mortis*.

This reservation referred to a point in the ancient law of Scotland, which I have always looked up to as of great excellence; and I have read cases where it was treated with great respect by Lord Hardwicke. By that law no deed is valid against the heir if executed on death-bed, that is, if the grantor be attacked with the sickness of which he dies, and does not survive a certain number of days. In the argument stated in the printed cases it was held out that this was a personal privilege in favour of the heir at law, a regulation for his benefit alone. But in my opinion this comes far short of the excellence of the regulations; it is also highly favourable to the dying man, that his last moments should not be disquieted. It was, perhaps, at first intended to put a stop to the granting legacies to the church, and to charities, which prevailed so much in those days; it now prevents the mischiefs that might arise from deeds obtained by besieging a person when near his death.

The heir has a right to set aside all deeds executed contrary to this regulation. It appears in the present case, that Colonel Craufurd entertained a purpose that Sir Hugh Craufurd, in whose favour he had made the

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former deed, should not succeed to his estate ; and that he also had the intention, when in a declining state of health, to leave it to a very respectable gentleman, an old and intimate friend, perhaps his relation. By him it was neither asked nor expected ; and when I mention, that this was Mr. Coutts, the respondent in the present appeal, I need not add, that he could be supposed to want it but little. Without communication with Mr. Coutts, he revoked the disposition in favour of Sir Hugh, and by same deed conveyed one of his estates to the former.

A singular transaction took place with regard to another estate, which he meant to give to Mr. Coutts by means of a fictitious sale for 4,000*l.* or 5,000*l.* He writes that gentleman a letter, mentioning that he had sold him the estate, and would give him a receipt for the price, but payment was still to be supposed ; and he desired Mr. Coutts to send him a bond for the money. This transaction makes no part of the present appeal.

After Colonel Craufurd's death, the appellant, his heir at law, claimed his estates, if no person could show a better right to them. For this purpose she brought an action before the Court of Session for setting aside the disposition to Mr. Coutts as void, being granted on death-bed ; and contending, that the pretended sale of the other estate was invalid, being a mere fiction. She called Mr. Coutts and Sir Hugh Craufurd as parties ; but the latter was entirely out of the case ; the only title he could make was through the deed which had been revoked. He however founded upon this, that it was the intention of the deceased that he should take the estate if it did not go to Mr. Coutts. But the deed in his favour was revoked in the most marked manner, and all intention as to him was clearly gone. When the question was agitated with regard to the estate which was the subject of the fictitious sale, Sir Hugh having stated his argument that if his deed was not revoked that estate must belong to him, the Court found that the heir was entitled to it, the deed to Sir Hugh being expressly revoked.

That determination was posterior to the decision which forms the subject of the present appeal in the other part of the cause, and Sir Hugh's argument, in some degree, arose out of that decision. The Court then held the ground of giving the estate to Mr. Coutts by some

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confused mode of reasoning, to be of this nature : " It is true, an heir at law has a right to set aside deeds executed on death-bed ; but what right have you in the present case ? Sir Hugh must take in preference to you, though his deed was revoked ; it was a revocation only to the purpose of validating the deed in Mr. Coutt's favour. Sir Hugh is a bar to you ; but as the intention of the deceased was not in his favour, therefore Mr. Coutts's right is against him."

The Court then added a good deal of reasoning upon the decisions which had been pronounced. In one of these, about twenty-five years ago, there occurred a case* where a person possessed of two estates, *A.* and *B.*, by one deed conveyed both estates to certain disponees ; and by a second deed executed on death-bed he conveyed the estate *B.* to certain other persons. Lord Auchinleck, a respectable Judge, before whom this matter was first argued, held, that the heir at law was entitled to the estate *B.*, and that the death-bed deed, though ineffectual as a conveyance, was sufficient as an *implied revocation* of the former deed with regard to that estate ; and he supported the first deed as to the other estate. This judgment was altered by the Court upon an appeal to them ; and it was determined that the death-bed deed was effectual, on the ground that the heir was cut off by the first deed, of which there was no express, but merely an implied, revocation, by the subsequent disposition of the estate *B.* on death-bed ; and that if the death-bed deed was not to subsist, the prior deed would be effectual. The Court of Session here made a distinction between an express revocation and an implied one, which I confess I do not feel. If a person makes a disposition of his estate, and locks it up in his repositories, and at the distance of ten years makes another disposition of the same estate, I should be of opinion that the former deed was revoked, and that the posterior one must take effect.

Another distinction was taken in the present case, namely, that though Colonel Craufurd being in death-bed could not execute a valid disposition of his estate, yet he could still execute the reserved power to alter contained in his former deed, and which he had charged on Sir Hugh Craufurd the volunteer. My objection to this is,

* Rowan v. Alexander, 22 November, 1775:

that such a resignation cannot be allowed. A man may reserve a power to charge his disponent, whose sole right being founded on the disposition, he cannot object to any part of it. But what is the nature of the reservation made by Colonel Craufurd? it is a reservation of a power to do on death-bed what the law says he shall not do in that situation. He might reserve a power to alter his former disposition at any time of his life, which was a reservation against the disponent, but he could not reserve a power against the heir at law to do a deed which was contrary to law.

I may illustrate this by mentioning an instance where Lord Hardwicke determined a similar question upon a similar point of law *. A person conveyed her estate to her daughter, an infant, with power to dispose of the same during her minority, or to devise it by will for certain purposes. The daughter was a grown infant, and under coverture. After the mother's death, the infant's husband got her to grant a conveyance to his creditors, which was a different purpose from those pointed out by the mother. The daughter afterwards devised her estate by will, and died before her age of twenty-one years. It was contended in this case, that though the daughter was an infant, yet what she did in execution of the power granted by her mother must be held valid. Lord Hardwicke appears to have been at first caught with this argument, but he was clear that the powers mentioned in the mother's conveyance were contrary to law; and though an infant of twenty years had a greater capacity of mind than one of tender years, yet by law they were under the same disabilities. The same mode of reasoning applies to the case now before us.

It appears that the judgment of the Court below must have proceeded in a fallacy. The deed in favour of Mr. Coutts being executed on death-bed was a nullity; the deed in favour of Sir Hugh was also a nullity, because it was revoked, both expressly and by implication. But the Court, in some singular way, by splicing these two nullities together, which taken singly were of no effect, formed a deed carrying off the estate from the heir, though against a positive law.

* *Hearle v. Greenbank*, 3 Atk. 695.

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The respondent founded part of his argument upon what is termed in Scots law the maxim of Approbate and Reprobate; Says Mr. Coutts, "if you approbate the revocation of the deed to Sir Hugh, contained in the posterior deed in my favour, then you cannot reprobate the other clause of that deed." But this is false reasoning. The Court cannot say to the heir at-law, Under what deed do you claim? It is enough for her to say, God and nature have made me heir at law; show me by what deed my right is cut off. The title of an heir at law is always complete, insomuch that a conveyance or devise to such heir in fee is held null, and of no avail. The law of England in such a case says, the heir is in by *descent*, and not by *purchase*.

Having stated so much of the argument in the present case, I must now mention the doubts that have occurred to me upon the subject. I cannot concur in the judgment which has been pronounced; and if I had been sitting as sole Judge in a court of law, bound to act according to the dictates of my conscience, I must have determined against the judgment of the Court below. But the case is different here: when I am to state what I conceive is fit to be done, I cannot arrogantly direct that my opinion should be held better than that of the Court of Session, and on a point of Scots law of great importance to the public, assert that they have been mistaken.

A matter, which I have yet to mention, appears to have biassed the Court considerably. Within these last twenty-five or thirty years an attempt has been made to remedy an inconvenience in conveyancing, which was a good deal felt. In Scotland every security on real estate is itself real. Persons in this country having money to lend are informed that the titles to estates in Scotland are clear, and that interest is there well paid; but they are staggered when they learn that they cannot dispose of such securities by will. A desire at first prevailed to have this matter settled by Act of Parliament, but it was not effected. The present Lord President of the Session, and the late Lord Justice Clerk, who was eminent for his knowledge in conveyancing, thought they could do away this difficulty, and still make a good security by creating, and so reserving, a power to devise by will. I am apprehensive that the decision in this case

would involve questions relative to the securities so vested in trustees, and therefore I feel the more delicacy with regard to it where the consequences might be so widely extended, and so disagreeable.

I have considered this point along with the noble and learned Lord already alluded to, and we agree in opinion that it should be regulated by an Act of Parliament, declaring that money secured on real estates should still be considered, and be devisable, as money, though descendable to the heir at law, as in mortgages in fee in this country.

Upon the whole, my opinion is that the case should be remitted to the Court of Session, with a direction to them to re-consider their judgment. I think a future consideration of it may open and enlarge the views of the Court; for upon a part of the cause subsequent to that now appealed from, they preferred the heir at law, and they must then have entertained an idea of the case which was not consistent with their former decision.

Ordered accordingly.

After the remit and judgment in the court below, and the argument upon the further hearing in the House of Peers, Lord Eldon, at the end of the session of 1803, delivered the following opinion:—

The Lord Chancellor:—

This is a cause which has undergone more consideration than almost any which I remember in this place. 6th August 1803.
I had hoped I should have found it in my power before the end of the present session of Parliament to have made a distinct proposition to you, either for affirming or reversing the interlocutors pronounced in this cause, but I have not yet been able to form an opinion to which I can give the character of judgment.

I have thought upon the cause with much anxiety again and again, but am not yet in possession of some facts, the knowledge of which would enable me the better to form my own opinion. I am aware, also, that some others of your Lordships (all now absent) whose sentiments are much attended to on such subjects, are not of one opinion in this case. One* of the noble and learned

* Lord Rosslyn.

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persons to whom I allude formerly considered this case very minutely, and I understand adheres to his former opinion, maintaining it on the same grounds; another † who attended the pleadings in this cause, though now necessarily absent, has inclined, I believe, to think that the present case is, in substance, though not in mode and form, no more than other cases of exception out of the law of death-bed; and a third ‡, who from indisposition has not been present at your deliberations during the present session, but who, whether absent or present, never fails to attend to what relates to judgments to be pronounced by this house, entertains, as well as myself, considerable doubt, whether, in a case of this sort, mode and form is not of the highest importance.

At one time I thought that it might be advisable to remit this cause to the Court of Session for further consideration, not recollecting the great consideration it had originally received in that court, and after it came here how much it was considered by the noble and learned lord then upon the woolsack. From the very mature discussion too that it has received since, and the great expense incurred by the parties, it does occur to me that future deliberation may be sufficiently employed, and necessary information may be otherwise obtained upon the points I am to allude to before the next session of Parliament. I have doubted the propriety of remitting also, because it is utterly impossible to do justice to the merit which I conceive belongs to the Court of Session for the learned and painful discussion given to this case, and the mode in which they have discharged their duty with regard to it.

This cause arises out of the settlement of a Colonel Craufurd. He was seised of two estates in Scotland, Craufurdland and Monkland. In 1771, he executed a settlement, conveying both these to himself in life-rent, and to Sir Hew Craufurd and others, in fee. That deed contained a clause dispensing with the delivery, and he reserved power to alter it at any time of his life *et etiam in articulo mortis*. The adoption of such a clause has been explained to arise out of what is termed in Scotland *the law of death-bed*. To avoid what were supposed to be inconveniences flowing from that law, it had been consider-

† Lord Alvanley.

‡ Lord Thurlow.

ed as law, that if a former deed had been executed in due time, a person might execute another even in lecto, which in given circumstances would be effectual. By connecting the latter with the former the disposition was considered to have been made at the date of the former, and so not to be challenged as not made in due time; but in most cases at least the former has been a deed valid, effectual, and subsisting in operation, at the death of the grantor.

About twenty-two years after making the first settlement, Colonel Craufurd in 1793 executed a new settlement of his estate of Craufurdland. It will be noticed that this contains a procuratory of resignation, a precept of seisin, and other clauses necessary for making up the feudal title in the person of the disponent, Mr. Coutts. This deed also contained certain superiorities in Renfrewshire, which were not contained in the deed of 1771. The estate of Monkland was not given by this deed to Mr. Coutts. If it required a joint operation, therefore, of these deeds of 1771 and 1793 to make a valid disposition, it is plain that as to the superiorities, and the estate of Monkland, there was no effectual conveyance.

The deed of 1793 contains the following clause, on which the question turns: [here his Lordship read the clause of revocation.]

Of the same date the Colonel executed a conveyance of his estate of Monkland by way of bargain and sale; but this was a fictitious transaction. The reason of his choosing this mode of making a settlement of that estate has not been distinctly explained. The disposition of 1771 was not then lying by him, and he did not recollect, perhaps, that Monkland also was included in that deed. He wrote a letter to Mr. Coutts to send him a bond for 5,000*l.* as the price of this estate, which, it is said, was accordingly executed; but it is not necessary at present to make any further statement on this point.

The heir at law then brought her action to set aside these deeds. It has been correctly explained to us, that the word *heir* is understood in Scotland in a different sense from what it is in this country. In Scotland an heir may be the person pointed out by the destination of former settlements of an estate. In this country the heir takes purely by descent; and the person taking by a destination is considered as a purchaser; as a person not

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taking in the quality of heir. Mrs. Howieson was the person destined to the succession by the settlement of the estates prior to 1771, she contended that the deed of 1771 was made a nullity by the deed of 1793, and that the deed of 1793 also was a nullity, being executed upon death-bed; and that you would not, (in the phrase of the noble and learned Lord who formerly in this house considered this case,) by splicing two nullities together, make a valid conveyance of the estate to Mr. Coutts.

In this action, Mrs. Howieson called Sir Robert Craufurd, as well as Mr. Coutts, as defenders. [Here his Lordship read the conclusions of her summons, Mr. Coutts's defences, and the interlocutors, 12th June 1795, and 17th November 1795.]

After the question of death-bed had thus been decided, Sir Robert Craufurd appeared, and stated, that the deed of 1771 was not absolutely revoked; and that if Mr. Coutts did not take the estate of Monkland under the fictitious sale, that he was entitled to it. Upon this point the Court pronounced an interlocuter adverse to Sir Robert's claim, declaring, that the settlement executed by Colonel Craufurd in 1771 was effectually revoked by the clause of revocation contained in the deed of 1793. It is fair, however, to observe, that the principle of that declaration cannot be stated more broadly, than that the deed of 1793 had no other effect than the effect of revoking as to the estate of Monkland. The decision, as to that estate, does not amount to a declaration of the Court that they ought to have come to the same decision as to the estate of Craufurdland, because the two estates were in different circumstances. Sir Robert Craufurd appealed against this judgment, but his appeal was dismissed for want of prosecution.

Mrs. Howieson also brought her appeal against the judgment as to the Craufurdland estate. When the cause came to a hearing in this house, very great attention was paid to it. I hold in my hand a note of what fell from the noble and learned Lord then on the Wool-sack, when the cause was sent back to the Court of Session, from which I shall read some extracts. [Here his Lordship read great part of the notes of Lord Rosslyn's speech as before stated.]

I have also the notes of the opinions formed by the Judges of the Court of Session, as they have been handed

to us, and of what passed in consequence of your remit. I should be wanting in due respect to that Court if I did not state it as my opinion that it is impossible to have discharged a duty more carefully, more anxiously, and more sedulously, than the Court have discharged theirs in this case. They differ considerably in opinion; but it has been the opinion of the majority that the former judgment was right. From these notes I cannot, however, accurately and precisely collect their respective opinions upon some (as they appear to me) important points.

The cause came again here by appeal, and has since been most ably argued by advocates from Scotland: the cases, whether similar or analogous, have been fully sifted, and the law of death-bed, and its effect on the public convenience, fully examined.

As to the law of death-bed, I never thought it necessary very anxiously to discuss its operation as convenient or inconvenient: it is enough that it forms undoubtedly part of the law of Scotland. It seems to have been relaxed from the rigour of the general doctrine concerning it in several decided cases; as in some cases the law of England, with regard to devises by will, has been relaxed. Though it be positively laid down that a mere deed on death-bed shall not disappoint the heir, yet if a former deed has been granted in *liege poustie*, the grantor may by a death-bed deed burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest in the estate given to such former grantee: the former deed, however, remains in that case valid as a title-deed to the estate, however burdened by the latter deed.

Analogous decisions have been pronounced in this country on the statute regulating the forms of attesting wills of land. By that statute three witnesses are necessary to attest a devise of real estate; yet it has been held, that if a testator devises his lands by a will so attested, subject to the payment of debts and legacies, he might afterwards by any writing, with or without witnesses, and even by any parol, transaction forming a contract of debt, charge, in legacies and debts, the devisee to the full value of the estate; though he could not so dispose of so much of the land itself as was of half a crown value to any creditor or legatee. Here, however, the estate

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remains in the devisee under the attested will, however burthened by what is not attested. Where a devise is duly made to trustees by sale of real estate to pay certain sums to given persons, and the residue to A. B., I apprehend that a subsequent devise of this surplus or residuary interest, attested by two witnesses only, would not be good. So much have we thought form matter of substance, that in this country, when it has been desired by parties that the Courts should apply the decided cases by analogy to others, the Courts have refused to say, that because you may in one mode effectually do what you intend to do, therefore, if you intend the same thing in effect, you may execute your intention in any other new mode of accomplishing it. The knowledge of this, as an English lawyer, may have, perhaps, caused a great difficulty in my mind in the present case.

I come therefore now to mention a doubt upon this cause, which I have not yet been able to get rid of. In most of the cases which have been cited, the first deed, the *liege poustie* deed, has remained an effective operative instrument at the death of the grantor. I don't mean as leaving a title to any thing beneficial in the grantee of the *liege poustie* deed, but as continuing at the death of the grantor an interest in the grantee of the *liege poustie* deed, on which the grantee of the death-bed deed must found his right, and to which he must knit and attach it.

If one makes a *liege poustie* deed in favour of one of your Lordships, and afterwards by a second deed on death-bed burdens the grantee thereof with some charge, the heir *alioqui successurus* would be by the first deed effectually cut out; and the grantee under the first deed is clearly bound to fulfil the directions of the second deed, for he cannot avail himself of the law of death-bed. So if the grantee in the first deed is ordered to convey to a person named in the death-bed deed. In both these cases the heir *alioqui successurus* is cut out by a *liege poustie* deed available at the grantor's death. In the one case the *liege poustie* deed gives the title to the estate though burdened; in the other also, though to be conveyed; in both, it is a subsisting operative instrument at the death of the grantor, cutting out the heir's title.

It is said, if you may disappoint your heir in this way, why not also by the mode used in the present case? if by giving a title to an estate burdened to its taker, or to

be wholly conveyed away, why not by a death-bed deed give the estate itself, a *liege poustie* deed having been once executed? My difficulty is to admit that a person can do what he has the power of doing by all the different modes in which he pleases to do it. The principle of the former cases appears to go only to this, that the grantee of the first deed would take if the death-bed deed was not effectual, and that the heir *alioqui successurus* had nothing to complain of in such a case, and the grantee of the first deed could not make any complaint. Now, though it is true that the present decision puts Mr. Coutts's case on the same footing, yet I do not find either in the notes of the Judges, or in the arguments of counsel at the bar, what is precisely the effect of the deed of 1771 in contemplation of law at the grantor's death. If a title to any estate is at the grantor's death left in the grantee of that deed, the case falls under one consideration; but if that deed at the death of the grantor was absolutely revoked, it is in effect the same case as if the *liege poustie* deed had been a disposition to the heir *alioqui successurus*, or as if it had never existed. When the interest under the death-bed deed knits and attaches itself to an estate to be claimed under the former, there is a *liege poustie* deed disposing of the title; but if there is no such estate to which that interest can attach, there is nothing but a mere death-bed deed.

To explain myself further: I have frequently put a question to my own mind of this nature, perhaps suggested by ignorance—Suppose the deed of 1793 had contained neither procuratory nor precept, it might still have furnished a good ground of action to get the property in due form; but who would have been defender in that case? Would the heir at law, or Sir Robert Craufurd? If Sir Robert Craufurd had no title to any estate remaining in him, then no action would lie against him. If the action was to be brought against the heir, must it not be admitted that the heir had some how got back the estate? This question has not been answered at the bar. The answer to it I must endeavour to collect; and I want to know whether the deed of 1771 be a necessary operative instrument in Mr. Coutt's title, as he must make it; or if he might without prejudice throw it in the fire; in one word, I wish correctly and precisely to know its effect, and whether the grantee of that deed is considered

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as entitled in law to any estate or interest in the property in order thereout to make good Mr. Coutts's title.

It was said that the deed of 1771 was not fully revoked, but only revoked *quoad certum effectum*; and that this was more a question of intention than of power: I doubt whether it is not a question of intention and power. I entertain no doubt of Colonel Craufurd's power to have given the estate to Mr. Coutts, nor of his intention to give it to him; but the law frequently gives the power of effectuating the intention only in one mode, and you can do what you intend in no other. If by saying that this is only a revocation *ad hunc effectum*, you mean that the deed is not revoked; but that Craufurd's title to the estate is burthened with a duty to convey or denude for the benefit of Coutts, and must be taken to continue for the purpose of so effectuating Coutts's title: then the deed is not wholly revoked; but if it is wholly revoked, it seems difficult to argue that because, if a *liege poustie* deed remains effectual at the death of the grantor, a death-bed deed shall defeat the heir, therefore, also, the heir shall be defeated merely because a *liege poustie* deed had been executed, but which did not remain in effect at the death of the grantor.

If Mr. Coutts had declined to take this estate, I wish to learn who would in that case have been entitled to it; would Sir Robert Craufurd take it in such a case? The judgment admits that the intention was exercised in a way to take the beneficial interest from Sir Robert Craufurd; if it be not given to Mr. Coutts, how should the heir proceed to make good his title? must he contend with Sir Robert Craufurd or Mr. Coutts? Could it be argued, if Mr. Coutts had not taken, that the intent to revoke was only *ad hunc effectum*, viz. to give to Mr. Coutts, and therefore if he would not take, Sir Robert should?

I may mistake this matter very much, but I have not been able to find any case where the law of death-bed did not take effect in favour of the heir, if the *liege poustie* remained at the grantor's death, without any effect as an instrument through which the title must be made, and the notes to which I allude, as well as the argument at the bar, contains an assertion that Mr. Coutts must make up his title under the deed of 1771 without explaining how, and the contrary assertion also, that he need take no notice whatever of it. As to these points

I wish for further satisfaction. If he need take no notice of that deed, I doubt whether authority has gone the length of this judgment. If he must take notice of it, in what way he is to do so has not been explained, I admit that it was Colonel Craufurd's intention to have revoked only *ad hunc effectum*, but I question if the purpose of the revocation be sufficient to sanction a new mode of conveyancing, if it be such; for I do not presume at present to say whether or not the meaning of the words used is understood to be such as puts the judgment on this ground, and this only, that because there was once, though not at the grantor's death, a *liege poustie* deed, therefore the death-bed deed is good.

I could put many cases from the law of this country illustrative of the difficulties I entertain. Suppose I were to make a will in this country, devising my real property to a certain person, and were afterwards, to execute another will, revoking my former will that I might make the other, and then devising my real property to one not capable of taking, the revocation would be perfectly good; but the devise being ineffectual, the heir at law would come in, though the intent of my act was to confirm the exclusion of him. Here is a fallacy, therefore, in the argument as to the effect of a revocation made *ad certum effectum*; if the revocation be complete, and an entire revocation is not a right mode of proceeding *ad hunc effectum*, the revocation will be good, and the disposition will be good for nothing.

If I were to intend to revoke a will already formally made in this country, meaning at the same time to execute another in due form, and had such will prepared and ready for execution, but was arrested by the hand of death before completing it, we hold in that case that the former will is not revoked, because the revocation is not complete, and the devisee under the former will would take. Neither of these cases so put from our law would support by analogy the present judgment. In the former case, the heir is let in; in the latter, the first devisee; this judgment excludes both the heir and Sir Robert Craufurd.

I may state unreservedly upon this part of the case, that I am not much impressed with the consideration of it as being an evasion of the law, or not such. There seems no doubt but that, in the circumstances of the case, it

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was completely in the power of Colonel Craufurd to have disappointed the law*; and I consider the question as a question whether he can do it in this mode: Whether he can do it without having a *liege poustie* deed in actual effect at his death? The suggestion so often made, that the heir was already cut out by the *liege poustie* deed, appears to me to assume all that is in dispute, for the heir cannot be said to be cut out till the death of the grantor, and therefore it may be said, that if at that time there is no effectual *liege poustie* deed, there was never any *liege poustie* deed that affected his titles.

Another doubt with me is, whether this case has been decided by the court below, on the point of approbate and reprobate, or not. I see in the notes of the individual Judges opinions that some of them have laid great stress upon this doctrine, though others thought differently of it; but the judgment of the Court as to that point I cannot collect. If the judgment were put on that alone I should entertain great doubt of it. It seems very nearly to resemble the doctrine of election in this country, though I am aware of the difference between what is understood by the word *heir* in Scotland, and what we understand by that term. The heir has been stated to be whom God and nature have made such: I should say that the heir in England is a person succeeding by the mere operation and provision of the law.

In our doctrine of election we hold, that if any person takes benefit under any instrument he must submit to the instrument altogether; but if I give a legacy in money to my heir at law, without any express condition annexed to the legacy, and give by the same will part of my real estate to another, and this without the attestation of three witnesses, the heir is entitled to take the legacy; and at the same time to say, this is no good devise as to the land, and accordingly, in such a case, the heir would take the estate. So in the case of a devise against the Statutes of Mortmain, he would take against

* The right of the heir stands upon decision. The decision which first gave the land to the eldest son, rather than to all the sons or children, and the decision which prevents a man from disinheriting his heir in his last sickness, within sixty days of his death, are no more law than the decision that he may do so, if he has previously executed a deed in *liege poustie*, which is unrevoked at the time of his death.

such a devise, though he claimed under the same will, for these are not cases of election.

If the English doctrines are to rule, this is nothing like a case of election. The heir here does not take the estate or benefit under the instrument, but under the law. If a testator in this country was required to make his will of land 60 days before death, it would be quite competent for the heir to say, This is a death-bed deed; I take the benefit of the law, and I take the land under the benefit of the law. And he might also take personal benefits under the will. There may, however, be a considerable difference, attending to the distinction of character between an heir in England and Scotland; and it is impossible not to see that some cases have been decided in Scotland, which very nearly support the doctrine of approbate and reprobate, as applied in this case.

A person in this country cannot, by a will of land made and attested in a regular form, reserve a power of making a future devise of the land which should be attested by less than three witnesses. And the courts of this country, though they have admitted subsequent bequests, otherwise attested of the whole value of the land, do not admit them as to a particle of the land itself; and the bequests of the value of the land must be supported by, and must knit and attach themselves to, an instrument remaining at the death of the testator, effectual to give title to the land itself against the heir at law. The title to the land, to convey the benefit of the land to those claiming under the unattested bequests, must remain at that time in some person claiming under a testamentary instrument duly attested to pass an estate in the land. Upon principles which, because they are very familiar to my mind, perhaps affect it so much in the present case, I doubt whether the death-bed deed can be supported, unless it can be founded upon some claim to the estate, available against the heir, created by, and continued available until, and at the death of the grantor, by the deed of 1771, to which the title under the deed of 1793 may knit and attach itself, as a burthen by a death-bed deed attaches itself to an estate created by a *liegepoustie* deed.

If it were my duty to decide the present case this day, I should feel it a very irksome task to pronounce that the judgment was right or wrong. I believe that my

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noble and learned friend, who has long paid so much attention to cases from Scotland, entertains considerable doubt of the judgment, if an estate of some kind or other be not remaining in Sir Robert Craufurd; if the *liege poustie* deed in making up the titles is to be regarded as an absolute nullity. It would be altogether indecent to decide the cause at present, in the absence of all the noble and learned lords, if I was more able than I am to state a judgment upon the case. But knowing the delay that has already taken place, and the anxiety that the parties must feel where such property is at stake, I should not have held myself excusable, had I not detailed to you at some length the whole circumstances operating upon my mind when I purpose that judgment should be postponed.

Cause adjourned accordingly.

The Lord*Chancellor (Eldon.)

March 1806.

This is a cause which has already occupied a great deal of attention from the Court of Session and from you. It originates in the settlements executed by Colonel John Walkinshaw Craufurd, the representative of an ancient and respectable family. He was seised and possessed of two estates, Craufurdland and Monkland, in the county of Ayr. In 1771 he executed a deed of settlement to keep up the representation of his family of his estates of Craufurdland and Monkland to himself in life-rent, and the heirs of his body in fee, whom failing, to Sir Hugh Craufurd, and the heirs male of his body, whom failing, to a certain other series of heirs.

This deed contained a power to revoke at any time of his life in *liege poustie*, or in *articulo mortis*. It remained in the repositories of the grantor undelivered at his death.

This instrument appears to be evidence of a purpose on the part of Colonel Craufurd to defeat the heir *alioqui successurus* from 1771 down to 1793. At the same time it is fair to observe that this case will fall to be decided as if the deed of 1771 was executed only 61 days before the death of the testator.

When, as is admitted on all hands, Colonel Craufurd was on death-bed, he executed a new settlement in Feb. 1793, of the estate of Craufurdland, in favour of Mr. Coutts, his heirs and assigns, containing a procuratory

of resignation, a precept of seisin, and other usual causes, (the same as in the former deed for vesting the estate feudally in the disponent,) we shall have to consider whether this deed be one altogether substantive, or if it be to be taken in connection with the former deed.

This deed, besides the estate of Craufurdland, conveyed certain superiorities which were not contained in the deed of 1771. These were clearly gone by the law of death-bed.

With regard to the estate of Monkland, this deed did not attempt to convey it to Mr. Coutts. I call your attention to this at present, as I shall afterwards have occasion to refer to it more particularly when considering the principle of the interlocutor as to Monkland.

[His Lordship here read verbatim the disposition of Craufurdland to Mr. Coutts, as far as the clause of revocation.] You will observe that this was a deed under conditions, reservations, and declarations, under which Mr. Coutts might have declined to take the estate. Hitherto it has every appearance of a substantive and independent disposition. [He here read the clause of revocation.] This clause, in revoking the former settlement executed by Colonel Craufurd, of course revoked also the procuratories and precepts contained in the former deeds.

The day after the date of this deed Colonel Craufurd wrote a letter to his agent, directing him after his death to open his repositories at Craufurdland. When this was done, the deed of 1771 was found lying there. He had not cancelled this former settlement; if cancelled at all, it is so by the deed of 1793.

Colonel Craufurd died soon after; but before his death, and of the same date with the deed of 1793, he executed a conveyance of Monkland, bearing on the face of it the receipt of 5,000*l.* said to be paid by Mr. Coutts as the price thereof. At the same time he wrote a letter to Mr. Coutts to send him his bond for that sum. If that bond was sent, it did not reach Colonel Craufurd in time, for he died six days after the date of the deed.

I must here remark the difference of the situation of the two estates of Craufurdland and Monkland. The heir *aliogni successurus*, by the judgment of the Court below, got this last estate. In their interlocutor of the 31st of Jan. 1798, the Court found that the deed of 1771 was effectually revoked by the clause of revocation con-

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tained in the deed of 1793, in consequence of which the estate of Monkland was adjudged to the heir. It was contended, that the principle of the decision as to the estate of Monkland was directly contrary to that in regard to the estate of Craufurdland.

The deed of 1793 conceived in favour of Mr. Coutts embraced the estate of Craufurdland, and the superiorities only, and did not affect the estate of Monkland, except in the clause of revocation. The clause of revocation revoked the deed of 1771, as well with regard to Craufurdland as to Monkland, but it also disposed Craufurdland to Mr. Coutts, and not Monkland.

The attempt to dispose of Monkland for a price was not fully completed, because not acceded to by Mr. Coutts in Colonel Craufurd's lifetime; as to Monkland, it was also clear that he meant the heir not to succeed, but the purpose of selling was only an inchoate purpose.

The decision as to the estate of Craufurdland is upon this ground, that, as to it, the revocation of the deed of 1771 was not an absolute, but a qualified, revocation to support the deed of 1793; whereas the revocation as to the estate of Monkland, of which the new conveyance was set aside, *restored the right of the heir aliqui successurus*.

The difficulty upon this interlocutor is, that it lays down as a general principle that the deed of 1771 was effectually revoked by the deed of 1793, and does not express that it was only revoked as to Monkland, and not as to Craufurdland, which was the meaning of the court.

The principle so generally laid down in this interlocutor was pressed against Mr. Coutts, but farther than it would go. There may be a finding in an interlocutor in too general terms, and still the conclusion be a sound one. In considering this case, it is very material to take into view, whether the decision as to the estate of Monkland be consistent with that as to the estate of Craufurdland, but it is too much to say that the decision as to Monkland is one directly contrary to that with regard to Craufurdland.

After Colonel Craufurd's death, Mrs. Howieson his aunt (not as we understand the term, but the heir *aliqui successurus*, as termed in Scotland) taking under former destinations in her favour, claimed these estates. In

prosecution of her claims she executed a trust-bond, as usual in such cases, on which an adjudication was obtained, and afterwards an action of reduction was brought against Sir Hugh Craufurd and Mr. Coutts. [His Lordship here read the conclusions of the summons of reduction, noticing the more especial ground on the law of death-bed. He next read the interlocutor of the 9th of June 1795, sustaining the reasons of reduction as to the superiorities which were not in the deed of 1771, and repelling them as to the estate of Craufurdland, and the interlocutor of the 17th Nov. 1795, adhering thereto.]

After the Court had thus decided as to the estate of Craufurdland, Sir Hugh Craufurd conceiving that the deed of 1771, if not revoked, gave him the estate of Monkland, put in his claim to that estate, but after a discussion upon that point, the Court, by their interlocutor of the 31st January 1798, to which I have already alluded, found that the deed of 1771 in regard to Monkland was effectually revoked by the deed of 1793.

Then came the first appeal here, which was heard and remitted back to the Court of Session; Lord Loughborough was then upon the woolsack, and another noble and learned Lord concurred with him in the opinion which he had formed. These two great and eminent persons were not content to discuss this question as one depending merely on the construction of the instruments which I have stated, but conceiving that there was in the principle of the judgment something vicious in regard to the law of death-bed, they were still anxious not to decide it, fearing that their own view of the case might bring into danger a system of securities as to trust-bonds, then of some standing in Scotland. The substance of the opinion delivered by Lord Loughborough in that case was as follows:—

[Here his Lordship read the same, of 16th Oct. 1800, commenting upon it as he proceeded.]

On the case of *Rowan v. Alexander*, quoted by the noble and learned Lord, I have no scruple to add the authority of my opinion to his; and if that case had come before me in a court of appeal in 1775, when it was pronounced, it would have been impossible for me to have given my assent to the judgment of the court in that case, reversing the judgment of the Lord Ordinary. I see

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the Lord Justice Clerk Miller says, in that case, as a ground of his opinion, in which the majority of the court concurred, that as the grantor might have burdened his estate to the full amount of its value, he might therefore give it to the disponent under the death-bed deed. But it by no means coincide with the doctrine, that because you may do a thing in one mode, therefore you may do it in any mode.

It is perfectly settled in this country, that in a will devising land, which must be executed in the presence of three witnesses, you cannot reserve a power to devise any part of it by a will executed in the presence of two witnesses only. We may devise land by will to be charged with legacies, or to trustees, to pay such sums of money as the testator may direct; and such legacies may be granted, or directions given, in any writing executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land, but not one particle of the land can be devised by our law but by a will in the presence of three witnesses. But the distinction goes a great deal farther; though the whole value of the land may be given in legacies, yet after giving legacies to a certain amount the surplus cannot be given away in this manner. The surplus is held to be land, and is not thus to be disposed of. These cases strongly prove the distinction between a power of giving by a certain mode, and giving by any mode.

Though I have said thus much of the case of *Rowan and Alexander*, it is, in my opinion, a very different thing to say what might have been done with regard to it in 1775, and what ought now be done at this day. It would not be on any dry reasoning that I should disturb the authority of this case as applying to another occurring in 1793 if they coincided.

In the present case, I think that the reasons of the Judge in the Court below altogether amount to this, that it was the testator's purpose to bestow the estates on Mr. Coutts by the last deed; and that he did not do so if he did not keep alive the former deed; they held that the deed of 1793 only revoked the former deed to the end of giving effect of the later one.

If it be asked what he did not mean to revoke, I understand it to be supposed that he did not mean to revoke

that which gave a right to the disponent in the deed of 1771, to adjudge from the heir at law if the disponent in the second deed should refuse to take. If Mr. Coutts should be unwilling to take under the deed of 1798, is there a right under the deed of 1771 to adjudge the *hereditas* against the heir? If such a right could not exist under the deed of 1771, under what pretence does that deed exist to bar the right of the heir?

Whatever I might have been disposed to decide in such a case as that of *Rowan* and *Alexander* in 1775, I should be one of the last men in the world, in 1806, to disturb that decided case, in so far as it applies to a case of implied revocation.

It appears from what was said by Lord Loughborough that those noble Lords who coincided in opinion with him were inclined to consider this as a case of fraud on the law of death-bed. My view of it is different; that this is not a case of fraud, and that the Appellant's case cannot be made out upon that ground.

[His Lordship here briefly stated the case of *Hearle* and *Greenbank* (Atk. p. 695.) mentioned in the note of Lord Loughborough's speech.]

That Noble Lord concluded with saying, that he was afraid a reversal of the judgment of the Court then under consideration, might trench upon the system established with regard to those trust-bonds to which I have alluded; and therefore he thought it better to send it back to be re-considered. He added, that Lord Thurlow and he were of opinion that it might be proper to prevent all question upon these trust-bonds by an Act of Parliament declaratory of the law. It appears to me that this case may be decided without touching any of these trust-bonds.

The cause was accordingly remitted to the Court of Session, where it underwent the most painful and minute re-consideration. I think I never saw a more honourable specimen of judicial ability than occurred in the discussion of this case when they formed the opinion on which this second appeal arises.

They re-considered this case in all the points of view in which it had been taken up in regard to the alleged fraud upon the face of death-bed; the whole principles of that law, and the particular facts and circumstances of the case. They at length narrowed the case very much from what had formerly been discussed, and put it upon what

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I think its true merits, the effect of the second deed upon the first through the clause of revocation.

They agree that if the deed of 1771 was cancelled, or wholly revoked by executing another instrument; if the right of the heir was let in *pro brevissimo intervallo*, that the deed on death-bed would operate nothing.

A narrow majority of the Court held, that under the deed of 1793 the deed of 1771 was not revoked absolutely, but under a qualification, and they therefore held, that if the death-bed deed of 1793 was challenged by the heir (for a death-bed deed is not in any view a nullity, but only liable to effectual challenge by the heir) the donee under it might found on the prior deed in 1771, and insist, with effect, that the heir had no interest to challenge the later deed, that if it was set aside Sir Robert Craufurd would have (as we should say in this country) a right to the estate; or, as they would say in Scotland, would have a personal right of action to obtain the estate. The true question in this case, therefore, is, whether or not, in a reduction brought by the heir of the death-bed deed of 1793, her claims could be repelled by any thing the donee under it could urge upon the deed of 1771, as at the death of the grantor.

If he could so repel the claim of the heir, he must prevail in this action; if he could not, then the present appeal would be well founded.

This question will still necessarily lead me into a discussion of some length, and I wish to reserve this till Tuesday, when I shall state my final opinion upon this case. If I be in error thereon, then I must say that it is conformable to the first views I have formed of the case, and that, with all the light since thrown upon it my opinion has never varied with regard to it.

12th March
1806.

Lord Eldon, [after reverting to the opinion delivered in part by him as above.]

The questions in this cause were anxiously discussed, and considered both before and after it was remitted to the Court below, by noble Lords, some of whom are now no more. One of these noble Lords (Rosslyn,) entertained but one unqualified opinion upon the subject throughout. He held that the settlement of 1793 was a fraud upon the law of death-bed, and that that deed was an unqualified revocation of the deed executed in 1771. His Lordship,

therefore, observed in strong, although not in legally accurate, language, that it was impossible to splice two nullities in order to make one effectual deed of disposition. This expression was not technically correct, inasmuch as the term nullity could not be applied with strict precision to the death-bed deed, because it was *primâ facie* a good deed, and was alone reducible by the heir, who was *alio-qui successurus*. But his Lordship's meaning was this, that the first deed *being revoked was an absolute nullity*, and if the death-bed deed *could not knit itself upon the first*, it was a nullity likewise in the popular sense of the word, as it could convey nothing. Such were the sentiments of the noble Lord, which coincided with those of several Judges in the Court below, and were supported there by very strong arguments.

Another noble Lord *, who is also now no more, seemed to regard the question in another view. So far as I could collect his sentiments he did not consider the death-bed deed as an invasion of the law of death-bed, nor the *liege-poustie* deed as altogether revoked by it; but his Lordship seemed to be of opinion that the first deed was to be considered as in existence to a certain effect, and he thought we should look at the effect of the two instruments taken together, and construe them so as that a disposition, which the disponent had a clear power to make, might be supported, and that the manner in which he did so was to be regarded as matter of form, and not of substance.

But to this last sentiment I never can agree. I entirely concurred with the other noble Lord whom I have mentioned, that matter of form in conveyancing is matter of substance; and that it is not sufficient that a person should have power and an intention to dispose of his property, but that in order to render it effectual he must execute it *habili modo*, or in other words, he must execute it in the form and with the solemnities prescribed by law for conveying such property.

The case of *Rowan and Alexander*, which I shall have occasion to remark upon more particularly hereafter, was more relied upon in the argument than I think it can well be. It was relied on in that case, and has been argued here, that the party might have given the value of the estate by a death-bed deed, and why therefore not give

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the substance or land itself. But this is not so by the law of Scotland any more than it is by the law of England. By the law of England, a will executed before three witnesses is necessary to convey land, and if land is so conveyed, it may be afterwards charged by a will which is not so executed. But it by no means follows, that because the total value of the estate could be conveyed in the way of a charge, although not attested, that therefore the land itself could be so conveyed. You know very well that even the surplus money arising from the sale of land cannot pass without a will attested by three witnesses, because a Court of Equity considers that as land.

It has been also said, that if a person means to revoke an instrument with reference to a particular purpose, if that purpose is not effected the original instrument is not revoked.

This proposition is to a certain extent true, but it is to be understood with various limitations and distinctions. It is true, that if a party sits down, meaning to revoke a disposition of his property, and by the same act, or as it is called *unico contextu*, to make a new one, if he makes the revocation, but dies before he has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose by a new disposition, the first is revoked however inadequate such new disposition may be to convey his property. Thus, if having made a will of land, I afterwards make another in which I revoke it, and give my land to a monk, or an alien, the revocation, is good although the devise is void, because the purpose was complete so far as it was in my power to complete it. In the present case, the purpose of the party to dispoⁿe his land anew was complete, which decides the case with reference to this argument.

A good deal has been said on the doctrine of Approbate and Reprobate, and that it barred the heir from claiming in this case. I have made a good deal of inquiry into the grounds of the decision, to see if it went upon that ground, and if so how it could be maintained upon it.

I think that this is not a case where the doctrine of Approbate and Reprobate will apply. The heir does not

claim under the death-bed deed: The heir says, "your deed does not give you a title unless you can show me a deed executed in *liege poustie*, existing at the death of the grantor: if there be no such deed, the deed executed on death-bed is gone."

In various cases, which I need not at present specially mention, the death-bed deed has been held to be good. The law of death-bed has been so far altered, that a person may by certain modes give away his estate by a deed on death-bed. Upon this point, as well as upon the practice which has prevailed with regard to trust-bonds, we cannot shake the cases without great danger to private property. In our own law we have also instances of a similar kind, in the practice with regard to the barring of estates-tail, and the making of conveyances to enable a person to give legacies without regard to the statute of frauds.

If by inveterate usage and practice you find mens titles standing in a certain way, you will support them to the extent of the usage; but it is a very different thing to say that you should carry the law beyond the usage.

It is admitted that if a valid *liege-poustie* deed existed at the death of the grantor, the death-bed deed would also be good. It is to be observed, however, that this *liege-poustie* deed must be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. This is obvious on principle—the stranger dispositive is bound to hold good any power reserved against him; if such power be duly executed he cannot complain. This seems also to have been admitted by all the judges, except those who decided against Mr. Coutts, on the ground of its being an evasion of the law.

It is clear that Colonel Craufurd meant to give the estate to Mr. Coutts. His power of doing so is also clear. In treating this matter, I deem it better to go upon the dry points of law than to consider whether it was more fit in Colonel Craufurd to prefer the nearest branch of an ancient family, or to give his estate to that deserving gentleman Mr. Coutts. The intention and power of the testator are both admitted.

The only question is, Has he executed that intention by effectual means? It is admitted on all hands, that Colonel Craufurd might have charged the estate vested

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in the grantee of the *liege-poustie* deed to its full value in favour of Mr. Coutts, or he might have directed him to convey that estate to Mr. Coutts. The testator in doing so acts in affirmance of the estate vested by the *liege-poustie* deed, for the person to take by the death-bed deed could not call upon the disponee under the former deed to denude, unless the estate was vested in him. The author of the death-bed deed, in such a case, so far from revoking, asserts the validity of the *liege-poustie* deed.

Such cases are not authorities for the present decision, unless you could say Sir Robert Craufurd had some estate under the deed of 1771, of which he could denude himself in Mr. Coutts's favour, or which Mr. Coutts could have adjudged. But it is impossible to say that he had such estate of which he could denude himself, or which could be adjudged, if it can be made out on the construction of the death-bed deed that such estate did not remain in him.

You know that in Scotland the maxim of *mortuus seisis vivum* does not obtain as it does in this country: a proceeding in that country to take up *hereditas jacens* is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement. I say this to prevent any misunderstanding of the language which I use.

Another case was put; it was stated, that the testator might have rendered the death-bed deed valid by a clause in it that he meant the deed of 1771 to subsist, if the death-bed deed was found to be ineffectual. I do not mean to deny this. He would then have said, if my death-bed deed is not good, or if the disponee under it would not, or could not, take from popery or other cause, then the disponee under the deed of 1771 might have said to the heir *alioqui successurus*, "the estate is mine;" and he might have proceeded to connect himself with it by his procuratory and precept, or if none had been contained in his deed, by adjudication. In that case this would be the express meaning of the testator; I keep alive the former deed to all those purposes to enable the disponee, in the death-bed deed, to say to the heir that he has no interest to impugn the death-bed deed.

When I considered the cases of implied revocation,

(and I have never considered any question more deeply than the present,) I am free to say that I never could have assented to affirm the case of Rowan and Alexander if brought before me by appeal at the time when it was pronounced. Lord Rosslyn stated, when this cause was first here, that he could not give his assent to that case. But there is a manifest difference between what might have been fit and proper to be done when that case was recent, and what may be so at this day. No man can say that many titles may not rest on the principle of that case of Rowan and Alexander; and were we to touch that case, we might shake securities, in the validity of which there had been great confidence for many years. I allude to the trust-bonds which had been devised and approved of by the most eminent persons upon the Bench in Scotland.

In that case of Rowan and Alexander a false principle was laid down on the Bench, that because the testator could effectually have given the value of his estate in money, therefore the disposition of the estate was valid. It was said in that case, that there was no express revocation, but it is difficult to perceive what could be a more express revocation than giving the estate wholly to another.

That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked unless the second deed was found to be good; and expressing nothing as to a revocation of the former deed, must be held to have meant in effect that both should stand to accomplish the purpose he wanted of giving the estate to the disponent in the last deed. This would apply also to the case of the disponent under the second deed being unwilling to take or incapable of taking.

But the same principle will not apply to a case of express revocation. This is the first instance where this principle has been so applied. It is unnecessary to enter into the cases of Birkmyre, &c, which are different from the present, in the revocations being by different instruments.

In the present case, as appears to me, there are only two questions; 1st, Is the disposition of 1771 revoked

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entirely? 2dly, Is it revoked *ad hunc effectum*, or *ad omnes effectus quoad*, this species of question.

The case of express revocation proves, (and the decision in this case, with regard to the estate of Monkland, is the strongest of them all) that if the heir is let in *pro brevissimo intervallo*, the intention or power of the grantor signifies nothing, though he had half a dozen ways of giving away his estate upon death-bed. It signifies nothing if this is not done *habili modo*. The cases of the destruction of the *liege-poustie* deed, though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, clearly show this, that what may be done validly in one mode cannot be so in any mode.

In the case of Monkland the Court seems to have had considerable difficulty with their own decision; more, indeed, than I feel with regard to it. The disposition of Monkland was by a different deed from that of Craufurdland. The former disposition of Monkland was revoked, that Colonel Craufurd might dispose of it by a sale; and on the same day he executed a disposition to Mr. Coutts by such mode of sale, but before completing this purpose Colonel Craufurd died. We see here strongly that the power to give away in certain modes, and the intention, are nothing. The Court, in their judgment declared, that it was the testator's purpose to give to Mr. Coutts, but they found (in terms too general to reconcile that decision with the decision with regard to Craufurdland) that the deed of 1793 had revoked the deed of 1771, and therefore they give the estate to the heir.

It is clear in this country, where an estate can only be devised by a will executed in the presence of three witnesses, that in such a will a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. All the doctrines connected with this rule of law were much canvassed in the case of *Habergham v. Vincent*. A person in this country cannot by the medium of a will or deed reserve to himself powers contrary to law.

In Scotland no man could make a valid *liege-poustie* deed in this form—"Know all men by these presents that I do hereby reserve a power to dispose of my estate

"at any time of my life, *et etiam in articulo mortis*." The *liege-poustie* deed must be some actual deed of disposition existing at the death of the grantor.

Put the case, that Mr. Coutts had repudiated the disposition in his favour contained in the deed of 1793; could the heir, under the deed of 1771, have made use of his procuratory and precept to attach himself to the *hereditas jacens*; or if there had been none such, could he have used an adjudication in implement against the estate? This question depends upon the fact whether the deed of 1771 was revoked by the deed of 1793, or not. If the testator left the deed of 1771 a subsisting deed, the donee under the death-bed deed might make use of that shield to protect himself against the heir at law. In order to find that this case can be ruled by the decision in *Rowan and Alexander* you must find the direct contrary of what the testator has expressed in the present case.

The deed of 1771 was a deed standing by itself, containing a procuratory and precept, and all the usual clauses of style. Let us see what the testator does or says with regard to this deed: Does he say that the deed of 1771 shall stand if the deed of 1793 is found not to be good? Does he substitute Mr. Coutts in the room of the donee under the deed of 1771? He does no such thing. The dispositive part of the deed of 1771, the procuratory and precept, are all revoked, and the deed of 1793 is made a complete disposition, standing solely by itself, containing a new procuratory and precept, and other usual clauses. It also contains the clause upon which the whole question turns. [Here his Lordship read the clause of revocation.]

The question of construction, as to what the testator has said, arises upon this. He says, I don't intend that the donee in the deed of 1771 shall take; nor that the deed of 1771 shall be *kept alive*, and that the donee therein shall denude in favour of Mr. Coutts; but I do expressly revoke that deed, so far as conceived, in favour of the persons to whom it is granted; and I keep it alive only with regard to the powers to alter, innovate, and revoke therein contained; thereby reducing the deed to nothing but one containing a power to alter and revoke.

I never in this case could bring my mind to any other opinion, than that the deed of 1793 reduced the deed of 1771 to a conveyance in favour of the heir *alioqui suc-*

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cessurus, because if the intermediate disposition was destroyed, the right of the heir to claim the estate was again set up. Any other opinion goes to make the deed of 1793 good by itself, which is illegal and impossible.

I put another question to myself, which I hope will free me from any charge of mistaking the law. I cannot conceive what the deed of 1793 would do, whether it contained an express or an implied revocation of the former deed, unless I were able to say, that if Mr. Coutts could not or would not take, some right to take up the *hereditus jacens* under the deed of 1771 would still remain. Now such right could not remain under the deed of 1771, because the revocation goes to every thing but what is therein excepted. How could a personal right of action be made out in the donee under the deed of 1771, as the deed of 1793 absolutely revokes that deed, as far as it contained any disposition?

The case turns entirely on the true construction of this part of the instrument; it destroys all right granted under the former deed without which the reserved powers to alter were vain.

In the opinion which I have formed I have the misfortune to differ from many persons in the Court of Session, of whom I am bound to say, that if I have been of any use in the matters of Scotch law I owe it to them; but I have also the satisfaction to agree with many others in that court, and with some who heard the case argued in this house.

I repeat, that this is a question of construction only, and that all apprehension must be gone of touching any title to estates, or any other decided case; the present case turning upon this point, and neither upon any general or special construction of the law. I shall defer giving in the judgment which I mean to move in this case till to-morrow, contenting myself at present with stating this conclusion, that the heir *alioqui successurus* has both a title and an interest in this case.

"Ven. 14 Mar. 1806.

The Lords &c. find, that in this case, the question, whether the heir hath a title and interest to challenge the deed of 1793, as made on death-bed, depends upon the particular nature and effect of the several deeds executed by the late Colonel Craufurd, and especially on the nature and effect of the deed of 1793, regard being had to the particular terms of that deed, as

expressing the same to be a revocation and recalling of all former dispositions; and find, that the deed of 1771, though executed in *liege pousie*, ought not to be considered as being at the death of Colonel Craufurd, such a subsisting valid instrument or disposition executed in *liege pousie*, as that thereby the interest of the heir to challenge the deed of 1793, as to the lands by the same deed disposed to the defender Thomas Coutts, should be deemed to be barred, inasmuch as the latter deed contains in terms the most express revocation of all former dispositions, assignments, or other deeds of a testamentary nature, formerly made and granted to whatever person or persons preceding the date thereof, and particularly of the deed granted in the year 1771, and contains the most express declaration in terms, that such deeds are to be void and null so far as they are conceived in favour of the persons to whom they are granted; and also find, that although the deed of 1793 contains a declaration that the former deeds should be valid, and sufficient to the extent of the powers therein reserved, to revoke, alter or innovate the same to the effect only of making the deed of 1793 effectual in favour of the said Thomas Coutts, such declaration ought not to be taken as the ground of an implication rendering such former deeds valid or effectual beyond the extent in which they are in express terms declared so to be, or to be made the ground of a construction whereby such former deeds should be held to be valid, or sufficient in any respect in which they are, by the same deed, in express terms, declared to be null and void; and find, that although such declaration was made in the deed of 1793, asserting the validity of the former deeds to the extent of such powers, all the dispositions in the former deeds having been revoked in express terms, there did not, according to the true effect of all the deeds taken together at the death of Colonel Craufurd, under any parts of the former dispositions so expressly revoked, and so expressly declared to be null and void, exist in any persons named in such former deeds any personal or other right in the lands by the deed of 1793 disposed to the defender, secure against the challenge of the heir, *ex capite lecti*, on which the disponent in *lecto*, under the deed of 1793, could be entitled to found as his defence against the reduction of the deed made in *lecto*; and find also, that as the deeds in this case are conceived as to the terms thereof, the disponees under the deed of 1793 cannot be considered as having title or right under the former dispositions, as if they had been named therein, or otherwise under the effect thereof; and find, likewise, that the heir is not excluded in this case from challenging the deed of 1793, *ex capite lecti*, and at the same time founding thereon, as revoking the former dispositions. And it is therefore ordered and adjudged, That the Interlocutors complained of, so far as they are inconsistent with the findings and declarations aforesaid be and the same are hereby Reversed; and it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be meet, regard being had thereunto.

Mrs. ANNE MAJENDIE and her } *Appellants :*
 Husband the Bishop of BANGOR }

W. T. CARRUTHERS and his Guar- } *Respondents.*
 dians - - - - - }

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UNDER a marriage-contract executed in 1735, lands subject to the limitations of an entail, made in 1708, are resigned by the husband, being heir in possession, and destined upon new infeftment to the husband, " and the heirs-male of the marriage, which failing, to the heirs-male of the body of the husband in any future marriage ; " which failing, to the *heirs-female* of the said spouses, " and the heirs-male to be procreated of their bodies, " the eldest daughter or heir-female, and the heirs-male descending of her, always excluding the rest, " and proceeding without division." To fulfil the obligations of this contract, the husband made up titles, and was infeft in 1736. A daughter was the only issue of the marriage. This daughter being married, by a contract, in which her husband joined, and which was carried into effect under a decree-arbitral in 1759, accepted from her father a sum of money " in full satisfaction of all right of succession which they have, or " in any event may have, to the lands subject to the " marriage contract, and of the provisions to children " of the marriage in any portion, &c. whatever, which " the daughter or her husband might claim on the decease of the father, and they accordingly quit claim, " and discharge the father from all demands, and renounce and overgive to him, his heirs and assignees, all " right, claim of succession, or other right which the " daughter and her husband have, or in any event may " have, under the provisions of the marriage-contract." In the same year, 1759, a disposition was executed by the father in favour of himself and the heirs-male of his body, whom failing, to his brother, &c. The daughter died in 1768, leaving a son, *J. R.* The father died in 1774. In 1806 *J. R.* was served heir to his mother, and brought an action to reduce the disposition of 1759, and all subsequent conveyances of the

lands subject to the marriage-contract of 1759. *J. R.* dying in 1811, the Appellant, Mrs. Majendie, became pursuer in the action, as the sister of *J. R.* and heir of provision, under the destinations of the marriage contract; held, 1st, that she was heir-female within the meaning of the terms of the destination; 2d, that the entail of 1708 was barred, both by positive and negative prescription; 3d, that the daughter had power to contract with the father, and renounce and discharge the right under the marriage contract as a *jus crediti* vested in her; the effect of which discharge is to bar the right of all other heirs of the marriage.

THE question in this case arose upon a marriage contract executed in 1735, by which lands (subject to an entail made in 1708,) were settled "upon *F. C.* the husband, and the heirs-male of his marriage with *M. M.*, whom failing, the heirs-male of *F. C.* in any subsequent marriage, which failing, the heirs-female to be procreated betwixt the said spouses, and the heirs-male to be procreated of their bodies, the eldest daughter or heir-female, and the heirs-male descending of her, always excluding the rest, and succeeding without division." *R.* a daughter and only child of the marriage being under coverture, with the concurrence of her husband, and by agreement with her father *F. C.* in consideration of 650*l.* to be paid by him, renounced her estate, right and claim under the marriage settlement.

This agreement was carried into effect by decree-arbitral, discharge and renunciation, in 1759, and the lands were settled by new dispositions made by the father on a new series of heirs. *R.* died before her father, leaving a son and two daughters. In 1806 the

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son served himself heir of provision under the marriage settlement, and brought an action in the Court of Session to set aside the dispositions by which his claim was affected, and the principal question in the cause was upon the validity of the discharge and renunciation. The Court of Session, after various interlocutors, by a final judgment delivered in 1812, affirmed the validity of the transaction, holding the renunciation good against the son of *R.* Under these circumstances the cause came before the House in 1816, and after much argument and doubt on the principal question, expressed by the Lord Chancellor, was remitted to the division of the Court of Session, from which it came, with directions that they should call for the opinions of the judges of the other division on the points of law arising in the case*.

July 10, 1816. A petition having been presented by the Appellants to the Court of Session, (First Division,) to apply this judgment, an interlocutor was pronounced on the 10th July 1816, appointing the case to be stated in mutual memorials.

Objection to
the title.

In the memorial which was thereupon presented for the Respondent, an objection occurred to the title of the Appellant, Mrs. Majendie, which was to the following effect :

By the marriage contract 1735, the estate is provided, “ to Francis Carruthers and the heirs-
“ male of the marriage with Margaret Maxwell,
“ whom failing, the heirs-male of Francis in

* The opinion of the Lord Chancellor at that time seemed to be adverse to the judgment of the court below on the principal question. MSS. May and June 1816, and see Dow's Rep. vol 4, p. 392.

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“ in any subsequent marriage, which failing, the
 “ *heirs-female* to be procreated betwixt the said
 “ spouses and the *heirs-male* to be procreated of
 “ their bodies.” Under this destination Mr. John
 Routledge was properly served heir of provision, as
 being the *heir-male* of the body of Mrs. Elizabeth
 Routledge, the only daughter or heir-female of the
 marriage of Francis Carruthers and Margaret Max-
 well. But the present Appellant, Mrs. Majendie,
 who is in a different situation, has served herself
 heir of provision to her brother John, taking it for
 granted that she is called as the next heir of this
 contract.

The destination is to the “ heirs-female to be pro-
 “ create betwixt the said spouses and the heirs-male
 “ to be procreated of their bodies, the eldest daugh-
 “ ter or heir-female, and the *heirs-male descending*
 “ of her, always excluding the rest, and succeeding
 “ without division; *which all failing, the said*
 “ *Francis Carruthers, his heirs and assignees*
 “ *whatsoever.*” The heir-female procreated of
 the spouses was Elizabeth Routledge; and John
 Routledge, her son, served himself heir of pro-
 vision as the heir-male of her body. But the pre-
 sent Appellant is *not* an heir-male of the body of
 Mrs. Routledge; and there is here no provision
 to the heirs-female of *her body*. It was submit-
 ted, that, according to the sound construction of
 the terms of the destination of the contract, the
 destination after the immediate heir-female of the
 marriage, and the heirs-male of her body, is “ to
 “ the heirs and assignees whatsoever of Francis
 “ Carruthers.” Under this last clause, the Appel-

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lant could have no title to challenge the settlement

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On the 15th of January 1817, the Court of Session, (First Division,) pronounced the following interlocutor :

Jan. 15, 1817.
Mem. June 6.

“ The Lords having heard and considered the
“ mutual memorials for the parties, and whole cause,
“ appoint supplementary memorials to be lodged on
“ the point of Mrs. Majendie’s title to pursue the
“ present action, whether in the character of heir of
“ provision under the marriage-contract of Francis
“ Carruthers of Dormont, or as heir of provision
“ served to her brother John Routledge ; appoint
“ the memorials to be seen and interchanged.”

These additional memorials having been advised, the Lords of the First Division ordered a hearing in presence upon the objection to the title.

After the discussion of this question the following in-

Feb. 3, 1818.

Interlocutor of
the Court of
Session, First
Division. First
interlocutor
appealed from
by the cross
appeal.

terlocutor was pronounced: “ The Lords having ad-
“ vised the supplementary memorials, and having
“ heard parties procurators in their own presence
“ upon the point of Mrs. Majendie’s title, they sus-
“ tain Mrs. Majendie’s title to pursue the present
“ action, as heir of provision under the marriage
“ contract of Francis Carruthers of Dormont, and
“ decern ; but find no expenses due to either party.”

This incidental point having been thus disposed of, the First Division of the Court of Session pro-

Feb. 25, 1818.

nounced the following interlocutor, in order to obtain the opinions of the Second Division and Permanent Ordinaries, in terms of the judgment of the House of Peers, on the questions stated in that interlocutor.

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“ The Lords having resumed consideration of,
 “ and advised the mutual memorials for the parties
 “ and whole cause, before answer, and in obedience
 “ to the remit from the House of Lords, order these
 “ memorials, &c. to be transmitted to the Judges of
 “ the Second Division and Permanent Ordinaries,
 “ with a request that they will peruse and consider
 “ the same, and thereafter give their opinions in
 “ writing, either collectively or individually, on the
 “ following questions in law arising therefrom :

“ 1^{mo}. Was the pursuer’s mother, Mrs. Routledge, vested in the *jus crediti* under the marriage-contract 1735; so as to give her power to discharge the obligation thereby incumbent on her father, either on receiving full and specific implement, or on such terms of compromise as her father and she settled, or as arbiters might decern ?

“ 2^{do}. Whether the decree-arbitral was meant to regulate the succession of the estate, or was confined to the money provision ?

“ 3^{tio}. Did Mrs. Routledge, by her discharge and renunciation in 1759, following on the relative agreement, submission, and decree-arbitral, effectually discharge her *jus crediti* under the marriage-contract 1735, so as to bar the claim of her son John, who, by her predeceasing her father, became the heir of the marriage-contract at his death, and, but for that discharge and renunciation by his mother, would have taken the estate under the marriage-contract ?

“ 4^{to}. Was the entail, in the former marriage-contract in 1708, effectual to secure the estate to the heirs-male of that marriage; and was it a

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CARRUTHERS.

Signed 26th
Feb.

“ valid and subsisting entail, binding on Francis
“ Carruthers in 1735?

“ 5^{to}. Supposing it to have been binding, is it
“ cut off by prescription?

The case having been considered by the Judges of
the Second Division and the permanent Ordinaries,
the following opinions were returned :

Jan. 16, 1819. “ In reference to the interlocutor of the First
“ Division of the Court of 25th February last, ap-
“ plying a remit from the House of Lords, we have
“ considered the printed pleadings on both sides,
“ and report our opinion on the questions of law to
“ which our attention is directed.

“ Answer to question 1st.—We are of opinion
“ that, in consequence of previous decisions, the
“ pursuer’s mother, Mrs. Routledge, must be held
“ as vested in the *jus crediti* under the marriage-
“ contract 1735, so as to give her power to discharge
“ the obligation thereby incumbent on her father,
“ either on receiving full and specific implement,
“ or on such terms of compromise as her father and
“ she might settle, or as arbiters might decern.

“ Answer to question 2d.—We are of opinion,
“ that the decree-arbitral was meant to regulate,
“ and that its terms must be held to apply to the
“ succession to the landed estate of Dormont, as
“ well as the pecuniary provision to which Mrs. Rout-
“ ledge might eventually have been entitled.

“ Answer to query 3d.—We think that Mrs.
“ Routledge, by her discharge and renunciation in
“ 1759, did effectually discharge her *jus crediti*
“ under the marriage-contract in 1735, so as to bar
“ the claim of her son.

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“ Answer to query 4th.—We are of opinion, that
“ the entail in the marriage-contract of 1708 was
“ from the beginning ineffectual, in so far as it re-
“ lates to the lands of Winterhophead ; but that as
“ to the lands of Dormont and others proceeding
“ from the husband, it was in 1735, and in conse-
“ quence of the titles afterwards completed by
“ Francis Carruthers, effectual in terms of the act.
“ 1695, chap. 24.

“ Answer to question 5th.—But it appears to us,
“ that all obligation under the marriage-contract
“ 1708 is now cut off by prescription.

(signed)

“ D. Boyle,
“ Wm. Robertson.
“ David Douglas.
“ Ad. Gillies.
“ D. Monypenny.”

“ To query 1st.—Whatever might have been the Jan. 18, 1819.
“ effect of a conveyance by the pursuer’s grand-
“ father of the whole estate, settled by the contract
“ of marriage entered into by him in 1735 in favour
“ of the pursuer’s mother, Mrs. Routledge, and
“ especially if she had survived her father ; we are
“ of opinion that, as no conveyance was granted to
“ her, and she did not survive her father, she had
“ no power to discharge the obligation in the said
“ contract any farther than concerned herself and
“ the heirs who represented her.

“ Query 2d.—We think that the decret-arbitral
“ was meant to apply to the estate as well as to the
“ sum of 1,000/. stipulated in the marriage-contract,
“ so far as regarded the interests of those who

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“ were parties to the submission. But that it can-
“ not in just or sound construction be held to ex-
“ tend to heirs of the marriage, who were not them-
“ selves, and do not represent those who were par-
“ ties to the submission.

“ Query 3d.—We are of opinion, that Mrs. Rout-
“ ledge, by the discharge alluded to in this query,
“ did not effectually discharge the *jus crediti* under
“ the marriage-contract 1735, so as to bar the
“ claim of her son John.

“ Queries 4th and 5th.—We agree with our
“ brethren that the destination of succession in the
“ marriage-contract 1735, was not rendered ineffec-
“ tual by the entail in the contract of marriage
“ 1708; and further, that this latter is now cut off
“ both by the negative and positive prescriptions.

(signed) “ William Miller.

“ Wm. Macleod Bannatyne.

“ Ro. Craigie.

“ D. Cathcart.

“ J. Wolfe Murray.

Feb. 25, 1818.

May 25, 1819.
signed 26th.
Interlocutor
of the Court
of Session,
First Division.
—Appealed
from in part
by the original,
and in part by
the cross ap-
peal.

The case then came to be advised by the First
Division of the Court; and a majority of the
division having declared their opinion to be in
favour of the Respondent, it was proposed that
the former interlocutor should be adhered to in
general terms. But the counsel for the Respond-
ent having observed that an interlocutor in such
terms would in point of form decide the question
of prescription in his favour, which was contrary to
the opinion expressed by the Judges, and that he
wished for an opportunity of bringing that question

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more particularly under the consideration of the Court, as he was afraid that his argument upon it might have been misunderstood by their Lordships, especially as it had been very much misunderstood and misrepresented by the Appellant ; and, besides, it had been held of such inferior importance that no specific judgment had hitherto been given upon it. For these reasons he prayed the Court, if the opinion of their Lordships remained against him on the point of prescription, to insert a finding to that effect in the interlocutor to be pronounced, in order that he might have an opportunity to reclaim against that finding, and, in his reclaiming petition, to state the merits of the question of prescription as unmixed with the other points in the cause. It appeared to the Court that this was a reasonable proposition ; and their Lordships not having changed their opinion on the question of prescription, the following interlocutor was pronounced :— “ The Lords having
 “ advised the memorials, and additional memorials,
 “ for the parties, and having also advised with the
 “ Lords of the Second Division of the Court, and
 “ with the Permanent Lords Ordinary of both divisions of the Court, and having reconsidered the
 “ whole cause in terms of the remit from the House
 “ of Lords,—They adhere to their former interlocutor of date 12th May 1812, and decern in terms
 “ of the said interlocutor in the two several processes therein mentioned : And further, in the process
 “ of declarator of irritancy and of reduction, brought
 “ at the instance of William Thomas Carruthers,
 “ and founded on the contract of marriage and settlement of tailzie of 10th August 1708, the Lords

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“ find, that all claim at the instance of the pursuer
 “ of the said process upon said contract of mar-
 “ riage and settlement of tailzie, is cut off by pre-
 “ scription both positive and negative; and there-
 “ fore sustain the defences in the said process,
 “ assoilzie from the conclusions of the same, and
 “ decern.”

This interlocutor was submitted to review in a re-claiming petition by the Respondent, in so far as it found that all claim at the instance of the Respondent upon the tailzie 1708 was cut off by prescription.

Dec. 16, 1819.
 Interlocutor of
 the Court of
 Session, First
 Division. Third
 interlocutor
 appealed from
 by cross ap-
 peal.

Answers having been ordered and given in to this petition, and one counsel on each side having been heard at length upon this point of prescription, the Lords of the First Division pronounced the following interlocutor: “ The Lords having resumed
 “ consideration of this petition, and advised the
 “ same, with the answers thereto, and having also
 “ heard the counsel for the parties thereon, they
 “ refuse the prayer of the said petition, and adhere
 “ to their former interlocutor therein reclaimed
 “ against.”

Mrs. Majendie entered an appeal from the interlocutor of 25th May 1819, sustaining the defences for the Respondent, founded on the discharge and renunciation in 1759.

Cross appeal
 of Respondent.

The Respondent entered a cross-appeal against the interlocutors of the 3d of Feb. 1818, from part of the interlocutor of 25th May 1819, and from that of 16th December 1819; in which the objection to the title and the point of prescription were decided against the Respondent.

The case was argued in the House of Lords at very great length, by

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v.

The *Attorney General* and *Mr. Brougham*, for *CARRUTHERS*, the Appellant.

Mr. Clerk and *Mr. Hope*, for the Respondent.

By the petitions of appeal three questions were raised, 1st, Whether Mrs. Majendie, being a daughter of a daughter of the marriage, was an heir-female within the meaning of the provisions of the marriage contract; it being contended by the cross appeal, that daughters only of the marriage were intended as heirs-female, which appeared from the provision for the heirs-male of such heirs-female? Upon this question the following authorities were cited:—

On the cross-appeal,

Pro:—*Creditors of Redhouse v. Glass*, 15th June 1743; Home's Decis. *Ewing v. Miller*, 1st July 1747. *Dalziel v. Dalziel*, 30th May 1809.

Con.—Erskine's Inst. B. 3, t. 8, §. 48. *Ker v. Ker*, Fac. Coll. 13 Nov. 1810.

The second and principal question was, Whether Mrs. Routledge, being heir of provision expectant, and predeceasing her father without having received implement of the contract, could for all future contingent heirs, as well as for herself, renounce the right of provision under the settlement, and by agreement with her father discharge his obligation? Whether she had a *jus crediti*, or merely a *spes successionis*? Whether in fact she did, by the terms of the agreement, &c. renounce for herself personally, or also for the other heirs of provision? On

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the former branch of this question (the right to renounce) were cited,

Pro :—*Case of Aikmans*, 20th Dec. 1550, Balfour, p. 222, 223. *Craig*, L. 2, d. 14, §. 10, 11. 22; *Stewart* on the obligation of Marriage Contracts; *Stair*, B. 2. tit. 5, §. 41; *Ersk.* B. 3, tit. 8, §. 38, 39. 41. *Cunninghame v. Cunninghame*, Jan. 17th, 1804. *Cunningham v. Stewart Hathorn*, Dec. 20th, 1810. *Case of Bairns of Young*, 7th July 1632, Durie, p. 2. *Hay v. Earl of Tweeddale*, *Stair*, July 21, 1676. *Panton v. Irvine*, March 1684. *Cairns v. Cairns*, Jan. 31st, 1705. *Ballinghall v. Henderson*, 1759; *Ersk.* B. 3, tit. 8, §. 87. 92. in fine. *Moodie v. Stewart of Burgh*, Jan. 17th, 1728*; affirmed by the House of Lords, Feb. 6th, 1729: cited in *Edgar v. Maxwell*, July 6th, 1736; *Kilk.* p. 148, and affirmed in D. P. on appeal, May 31st, 1742. *Rankine v. Rankine*, Feb. 17th, 1736; *Home's Dec.* No. 17; *Elchies' Dec.* vol. 2. tit. Mutual Contract. *Trail v. Trail*, Jan. 7th, 1737. *Creditors of William Scott v. Blair*, *Elchies' Dec.* tit. Seisin and Confirmation, No. 5. July 30th, 1736. *Moncrieff v. Moncrieff*, 8th Dec. 1759. *Sinclair v. Sinclair*, Nov. 27th, 1768; affirmed in D. P.; *Kaimes's Sel. Dec.* *Fotheringham v. Fotheringham*, June 20th, 1797. *Allardice v. Smart*, Feb. 16th, July 14th, 1720; affirmed in D. P. 21st Feb. 1721. *Stewart Thriepland v. Sinclair*, affirmed in D. P. Feb.

* No where reported, but the circumstances appear stated in the printed cases delivered in to the House of Lords upon the appeal; from which, and from recitals, statements and arguments in other cases, it was contended by the Appellant that the heir of provision predeceased the father in that case.

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13th, 1770. *Cowan v. Young*, Feb. 9, 1769; Gosfird. *Wauchope v. Wauchope*, Feb. 6, 1683. *Cunninghame v. Cunninghame*, July 9, 1776. *Sinclair and Moodie v. Sinclair*, July 29, 1768. *Lawson v. Lawson*, Feb. 6, 1777. *Henderson v. Henderson*, July 26, 1782. *Lamond v. Lamond*, July 30, 1776. *Boyd v. Boyd*, Jan. 6, 1670.

Contra :—*Lyon v. Creditors of Easter Ogle*, Jan. 1724; Kaimes's First Collection, p. *Case of Hamilton*, 21st of Feb. 1690. *Case of Preston*, 15th July 1691. *Creditors of M^cKenzie against his Children*, 2d Feb. 1792; Voet, lib. 5. tit. 2, §. 3; Bank. vol. 2, p. 338; Ersk. B. 3, tit. 8, §. 38. *Hay v. Lord Tweeddale*, Stair's Decisions, July 31, 1676. *Panton v. Irvine*, Harcarse, March 1684. *Cairns v. Cairns*, Harcarse, 31st Jan. 1705. *Case of Cunyngham*, Jan. 17, 1804. *Anderson v. the Heirs of Shields*, Kilkerran, Nov. 16, 1747. *Christie v. Dunn and others*, Fac. Coll. Jan. 21, 1806; Bankton, vol. 1, tit. 5, §. 10; Ersk. B. 3, tit. 8, §. 39, p. 603. *Inglis v. Hamilton*, Dict. vol. 1, p. 220, Dec. 4, 1734. *Bayne v. Sir John Belsches*, Feb. 16, 1793. *Atkyn's Rep.* vol. 2. 160; 1 *Wilson*, 229. *Machonochie v. Greenlees*, 12th Jan. 1780. *Cunningham v. Hathorn*, 20th Dec. 1810. *Lord Wemyss v. his Father's Trustees*, 28th Feb. 1815. *Case of Powrie*, (*Fotheringam v. Fotheringam*,) as to the question of fact, whether the son predeceased or survived the father in the case of *Stewart of Burgh*. *Harvie v. Craig*, Buchanan, 12th Dec. 1811, containing the opinion and statement of Lord Meadowbank as to case of *Elsieshiels*.

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The third question was, Whether the settlement of 1708 was cut off by positive or negative prescription, and to what title the possession was to be ascribed? On these points were cited,

For the Appellant in the original appeal :—*Porterfield v. Porterfield*, Dec. 6, 1771. *Case of Welsh Maxwell*, June 21, 1808. *Balfour v. Lumsden*, 13th June 1811. Fac. Col. Edgar, Jan. 17, 1724, *Case of Muirhead*, Lord Kaimes, 11 Feb. 1724. *Earl of Dundonald v. Marquis of Clydesdale*, Kaimes's First Col. Jan. 21, 1726. *M'Dougal v. M'Dougal*, Clerk Home, 10th July 1739; June 25, 1785, Menzies; Cod. de Loc. et Conduct. L. 4, tit. 65. L. 25. *Harris v. Anderson*, Spott. voce Possession. *Cunningham v. Cook*, Spott. voce Removing; Stair, 177; Bankton vol. 1, p. 514; and Ersk. 176. Dict. voce Mutual Contract, p. 598, *et seq.* and 7th Feb. 1777, Carnegie.

For the Respondent :—*Carmichael v. Carmichael*, 5th Nov. 1810. *Case of Welsh Maxwell*. *Balfour v. Lumsden*. *Smith and Bogle v. Gray*, Kilkerran, p. 424. Ersk. Inst. B. 2, tit. 1, §. 50.

After an elaborate argument on the 25th, 26th, and 31st of May, and on the 1st and 5th of June, the judgment of the Court of Session was affirmed on all the points.

Judgment affirmed.

SCOTLAND.

COURT OF SÉSSION.

The Governors of Heriot's Hospital - *Appellants* :
 J. C. Ross - - - - - *Respondent*.

WHEN a vassal sub-feus his possession for its full adequate value at the time, it is only a year's sub-feu duty, and not a years rent upon the value improved by buildings, which he is bound to pay to his superior, as a composition for an entry to a singular successor.

THE Respondent held under the Appellants a piece of ground in Edinburgh, at the yearly feu-duty of three bolls of wheat and three bolls of barley: The composition payable to the Appellants as superiors on the entry of a singular successor was not taxed. The Respondent, upon his entry in 1804, paid a composition of 30*l.* sterling, which was the nominal value of the land. In 1807 the Respondent sub-feued the land to builders, who covered the ground with houses. The duty reserved upon the sub-feus was about 420*l.* per annum, and the gross rental of the houses built and building was stated to amount to 3,000*l.* per annum. The feudispositions to the sub-vassals stipulated for a duplicando of the sub-feu duty on the entry of every heir and singular successor, and prohibited sub-infeudation. In the year , the Respondent being desirous to sell his interest in the feus, applied to the Appellants to assess the composition upon the

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entry of a purchaser. The Respondent proposed to pay 420*l.* the amount of one year's sub-feu duty. The Appellants refused to accept less than one year's full value of the land,* as improved and increased by the buildings. The Respondent thereupon brought an action against the Appellants, seeking a declaration that purchasers were entitled to demand an entry from the Appellants, as superiors, on payment of 420*l.* in full of the composition exigible by the superior upon the entry of the singular successor; and that the Appellants and their successors, as superiors, should be decerned to enter purchasers and singular successors of the Respondent, as vassals, accordingly on payment of 420*l.* or the amount of sub-feu duties for one year, in full of non-entry duties, casualties of superiority, and other claims for entry of singular successors.

The Appellants contended in their pleadings in defence, that they were entitled to a full year's value at the time when the entry was to be given.

The Lord Ordinary and the court, upon a reclaiming petition, after condescendences and a hearing, delivered judgment for the Respondent. Upon a further reclaiming petition, praying the court to alter the interlocutor pronounced, so far as to find that the Appellants were entitled for the entry of an adjudger or purchaser to one year's sub-feu duty, and one year's average value of the whole profits derived by the pursuer and his successors from his sub-feus, by casualties or in any way whatever, the court by an interlocutor, pronounced on the 6th of June 1815, adhered to their former judgment*.

* See the Report in the Fac. Coll. vol. p.

From these several interlocutors the appeal was presented.

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For the Appellants :—The *Lord Advocate*,
Mr. Warren, (and *Mr. J. Miller*.)

For the Respondents :—*Sir S. Romilly* and *Mr. Moncrieff*.

The authorities cited were,—

For the Appellants, *Aitchison v. Hopkirk*, Fac. Coll. 14 Feb. 1775 ; *Jordanhill v. Craufurd*, 13 Feb. 1752 ; *Kilkerran*, 395, and *Lord Elchie's, voce Tack*, No. 18. *Alison v. Ritchie*, 3 Feb. 1730 ; Dict. vol. 2, p. 419 ; *Bankton*, B. 2, tit. 9, § 6 ; *Erskine*, B. 2, tit. 6, § 27. *Cowan v. Lord Elphinstone*, 20 March 1636 ; *Stair*, B. 3, tit. 2, § 24 and 27 ; *Ersk. B. 2, tit. 11, § 24. Erskine v. Earl of Home*, 17 July 1630, *Durie. Brandon Baird*, contra, 18 July 1633, *Gibson* ; *Ersk. B. 2, tit. 5, § 7 and 12. Cathcart v. Tait*, 15 Feb. 1782, Fac. Coll. ; *Kaimes's Stat. Law, voce Feu. Almond v. Hope*, 9 March 1639, *Durie. Gray v. Allan and Taylor*, 1810.

For the Respondents,—

Heriot's Hospital v. Ferguson, July 30, 1773, Fac. Coll. vol. 5, No. 83 ; *Elchie's Decis. voce Feu* ; *Craig*, 2. 20. 32 ; *Stair*, 3. 2. 27 ; *Bankton*, 3. 10. 19 ; *Ersk. 2. 12. 24. Ramsay v. Earl of Rothes*, March 23, 1622 ; *Durie. Paterson v. Murray*, 30 March 1637, *Durie* ; *Stair*, 2. 4. 66. *Monkton v. Yester*, 15 Feb. 1634, *Durie. Cowan*

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v. *Lord Elphinstone*, 26 March 1636, Durie;
Spottiswoode's Practicks, p. 56. *Almond v. Hope*,
 9 March 1639, Durie. Stair, 2, 4. 32; ib. 4. 45.
Bankton 2, 4. 66.

The case stood over for judgment from the time of the argument in 1818 until the end of the Session 1820, when the Lord Chancellor, in moving the judgment, observed, that it was a question of great importance and difficulty; that he had bestowed upon it, at various times since the argument, much and repeated attention, but he could not venture to advise the House to disturb the judgment.

The result of his deliberation was, that the majority of the judges below had decided the case properly.

Judgment affirmed.

24th July 1820.

INDEX.

N. B.—*The initials L. R. in the following Index, Subjoined to some of the articles, denote the opinions expressed by Lord Redesdale. In all other cases the opinions are those of the Lord Chancellor.*

ACCEPTANCE. *Vide* BILL OF EXCHANGE.

ACCOUNTS. *Vide* ARMY AGENTS. EVIDENCE. EXCISE.

FRAUD. INTEREST. PLEADING. PRACTICE.

ACQUIESCENCE. *Vide* DECREE. PARTNERSHIP.

ACTION. *Vide* PLEADING.

AFFIDAVIT:

Semb. That affidavits (filed upon interlocutory proceedings) are to be considered as matters of record, and that the facts disclosed by affidavits so filed may be viewed by the court in deciding upon the validity of a plea.—*Quere.*
—*Wood v. Rowe* - - - - - p. 596

AGENT. *Vide* ARMY AGENT.

AGREEMENT. *Vide* FRAUD. FAMILY COMPACT. INTEREST.

PARTNERS. PLEADING.

According to all law, and upon principle, where there is fairly a doubt as to the rights of parties, and an agreement without fraud, it is binding. In a case of doubt as to legitimacy, an agreement between claimants to divide the property is valid.—*Hotchkis v. Dickson* - - - 348

The case is different where there is a question, whether the parties dealt with equal knowledge of the subject - *ib.*

So where (as in the case of *Gordon v. Gordon*) there is a suppression of a material fact by one of the parties, viz. the private marriage of the father, which the defendant knows, and calls a mere ceremony. The fact, whatever its character may have been, should be com-

municated at the time of the agreement.—*Hotchkis v. Dickson* - - - - - p. 348
 Such communication is essential to the fairness and validity of the transaction between brothers on a question of rights depending upon legitimacy.—*Id.* - - - 348, 349

ALIENATION. *Vide* TAILZIE.

AMBIGUITY. *Vide* CONSTRUCTION.

AMENDMENT. *Vide* DECREE.

APPEAL. *Vide* COSTS. DECREE. INTEREST. PRACTICE.

Care should be taken in framing cases to show what are the points of appeal. (L. R.)—*Lansdowne v. Lansdowne* - 97

APPOINTMENT. *Vide* DEVISE. POWER.

An appointment under a power given by contract, being of a sum of 3,000*l.* a year, lawful money of Great Britain, issuing out of lands in Ireland, such sum must be paid in such lawful money, unless the instrument of contract in all its other parts manifests a clear intention to the contrary.—*Lansdowne v. Lansdowne* - - - 92, 93

APPROBATE AND REPROBATE. *Vide* DEATH-BED.

ARMY AGENTS,

Having distinct accounts with the colonel and the paymaster of a regiment, upon the assurance of the paymaster that he was authorized by the colonel, and on his account, to provide certain articles for the regiment, transfer to the debit of the colonel as such standing in their books, originally debited to the paymaster; and having settled accounts with, and the balance due from the paymaster, sue the colonel for the balance claimed as due from him, including the sum upon the debit transferred. Pending this action, the paymaster, on the requisition of the agents, furnishes them with a letter from the colonel as the authority for the charge against him. The agents being fully satisfied as to the extent and meaning of this authority, in the course of their pleadings maintain strenuously the right of the paymaster to act under it, and judgment in the first instance is given in their favour. After they had obtained this judgment, apprehending the possibility that it might be reversed, they re-transfer the sum in dispute from the debit of the colonel to the debit of the paymaster, giving him notice

of that fact, and of the proceedings in and state of the action against the colonel. The former judgment, on representation, was reversed; and it was held by the Court below, and by the House of Lords on appeal, that the agents were entitled, in an action against the paymaster, to recover the sum in dispute, and the costs of the action against the colonel.—*M'Donald v. Ross*, p. 547

If an action is brought for the benefit, and through the intervention of another, he is bound to bear the costs of the action.—*Id.* - - - - - 547

ASSIGNEE. *Vide* FRAUD.

AUTHORITY. *Vide* CONSTRUCTION.

BAR. *Vide* ENTAIL.

BILL OF EXCHANGE:

If a bill of exchange be accepted, payable at the house of P. & Co. it is a qualified acceptance,* restricting the place of payment; and the holder is bound to present the bill at that house for payment, in order to charge the acceptor of the bill. If he brings an action upon the bill against the acceptor, he must in his declaration aver, and on the trial prove, that he made such presentment; and for want of such averment, the declaration was held bad on demurrer.—*Rowe v. Young* - - - - - 391

That an acceptor may qualify his acceptance is clearly established, by cases including almost every species of qualification. If the qualification as to place cannot be introduced by the acceptor, it must be on account of some circumstance which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever.—*Id.* - - - - - 403

When a bill is drawn generally, considering that it is an address to the person who is to accept it generally, it is the duty of the acceptor who intends to give a special acceptance, to accept in such terms that the nature of his contract may be seen in the terms he has used; that the acceptance may clearly appear to be qualified or special, which he insists is not general.—*Id.* - ib.

* But now by 1 & 2 Geo. 4. c. 78, such acceptances are not qualified but general, unless the acceptor adds the words "only, and not elsewhere."

- When the acceptor *uno flatu* writes the words, "accepted payable at such a house," the word "accepted" is not to be taken to express the whole of the acceptor's contract, but the latter words are also to be taken as part of it, and are not to be construed distinctly as a direction, or expression of engagement.—*Rowe v. Young* - p. 404
- If an acceptor promises to pay at his bankers in London, and the holder calls upon him in Northumberland, the payment is not the same. He presumes that the demand is to be made at the bankers in London, and the funds are deposited there. But if the acceptor is unexpectedly to meet the demand in a distant place, the cost of the exchange and remittance backwards and forwards must be added.—*Id.* - - - - - 406
- If the law be, that although a bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the holder, of giving notice to the drawer and previous indorsers, if he intends to keep alive their liability.—*Id.* - - - - - 407
- It is not true that an acceptor *must* be antecedently the debtor; all the cases of qualified acceptance show the contrary. A man may accept to pay out of the produce of a cargo consigned to him, when that cargo shall arrive in England. In the case of *assignee*, his acceptance is almost universally qualified.—*Id.* - - - - - 409
- Money paid at Torpoint and in London are different things; and if an acceptor of a bill is liable to be called upon at both places, his liability is rendered more inconvenient.—(*L. R.*)—*Id.* - - - - - 412

CASES. *Vide* APPEAL. PRACTICE.

CHARGE. *Vide* INTEREST. RENT-CHARGE. TRUST.

In the naked case of a charge upon lands, the law is clear and settled; but upon wills and instruments of marriage contract, all the cases cited authorize a distinction. In such cases, the intention of the person making the will, and of the parties to the contract, is to be collected from the different parts of the instrument.—*Lansdowne v. Lansdowne* - - - - - 88

CHURCH OF SCOTLAND. *Vide* SECESSIONS.

In the year 1736, a meeting-house was built by contributions of materials, money and labour, and collections

at the church door, of persons professing the principles of those who seceded at that time from the church of Scotland. The meeting-house, and the ground on which it was built, were vested in certain persons as trustees, for the use of the society and managers of the house of public worship for the associated congregation of Perth. A schism took place in 1796 among the members of this religious community, and several of the members, including the representatives of some of the trustees, to whom the legal right of property had devolved, separated themselves from the rest of the community, and absolved themselves from the authority of the associate synod, which was the constituted authority for the government of the community. This separation took place on grounds of alleged difference of opinion, on a question as to the power of civil magistrates in religious concerns, which the court of session pronounced to be unintelligible. Held, that in a case where it was difficult to ascertain who were the legal owners as representatives of the contributors, the use of the meeting-house belongs to those who adhere to the religious principles of those by whom it was erected; and those who had separated themselves from the associate synod, and declined their jurisdiction, were held to have forfeited their right to the property, although it had been judicially declared that there was no intelligible difference of opinion between them and the adherents of the synod.—*Craigdallie v. Aikman* - - - p. 529

CONDUCT. *Vide* PARTNERS. PARTNERSHIP.

CONSIDERATION. *Vide* CONTRACT. FRAUD.

CONSTRUCTION. *Vide* INTENTION. LEASE. LEGACY.

PARTNERSHIP. POWER. RENT-CHARGE. SETTLEMENT.

WORDS.

Decisions ought to accord with former authorities if possible, but at all events the established rules of legal construction ought to be adhered to.—*Jesson v. Wright* - 50

“Heirs of the body” mean one person at any given time, but they comprehend all the posterity of the donee in succession.—*Id.* - - - - 53

Children are included in “heirs of the body;” and if there is but one child, he will be “heir of the body,” and his

issue will be "heirs of the body;" but because children are included in those words, it does not follow that they must mean children only, where you can find on the will a more general intent, comprehending more objects.

—*Jesson v. Wright* - - - - - p. 54

When a testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, the first words are not to be cancelled or overthrown. (L. R.)—*Id.* - - - 56

The words, "for want of such issue," are far from being sufficient to overrule the words "heirs of the body."

They have almost constantly been construed to mean an indefinite failure of issue; and, of themselves, have frequently been held to give an estate-tail.—*Id.* - 57

In ambiguous contracts, the domicile of the parties, the place of execution, the purpose, and the various provisions and expressions of the instrument, are material to be considered in the construction.—*Lansdowne v. Lansdowne* - - - - - 60

Whatever the rule may be in the simple case of a rent-charge, in a devise the construction must be according to the intention.—*Id.* - - - - - 91

CONTRACT. *Vide* CONSTRUCTION. CUSTOM. LEASE. PARTNERSHIP. PRACTICE.

In the case of a reciprocal contract, a party cannot be admitted to say that he has no consideration for a sacrifice which he binds himself to make. When a tenant is making such a bargain, he provides in the other conditions of the lease a consideration for what he gives up to the landlord.—*Roxburghe v. Robertson* - - - 166

Where the tenant is to enter upon the arable lands at the separation of the crop, and to quit at the corresponding period, and no special provision is made by contract, the law of custom may qualify the right of the incoming tenant, and give to the outgoing tenant certain privileges, as the right to enter, for the purpose of thrashing, after the expiration of his lease.—*Id.* - - - 167

COSTS. *Vide* ARMY AGENTS. DECREE.

Where the appeal extends to the question of costs, and a term given according to a power to secure an an-

nulty, provides for the payment of all costs and charges relating thereto, the reversal of an erroneous decree ought to be with costs.—*Lansdowne v. Lansdowne* p.

COURT OF JUSTICE:

A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion upon a question of law, *e. g.* the admissibility of evidence.—*Dunbar v Harvey* - - - - - 351

COURT OF LAW. *Vide* PRACTICE.

Although it is highly useful in legal questions to resort to the assistance of courts of law, yet courts of equity are not bound to adopt the opinions of those courts to which they send for advice —*Lansdowne v. Lansdowne* - - - - - 60. 86

COVENANT. *Vide* LEASE.

CREDITOR. *Vide* DECREE.

CURRENCY. *Vide* INTENTION. LEGACY. MONEY. POWER. RENT-CHARGE.

In all cases upon legacies, where the word “sterling,” or some word equivalent has been used, the money has been held payable in English currency, although the testator was resident out of England.—*Lansdowne v. Lansdowne* - - - - - 95

CUSTOM. *Vide* CONTRACT.

The custom of the country can have no operation where there is a contract with provisions applicable to the point in dispute. — *Roxburghe v. Robertson* - - - - - 156

Admitting the existence of a law founded on custom, in construing a written contract, the engagements of parties to each other by the express stipulations of a written instrument, exclude all consideration of the custom of the country. - - - - - 167, 168

Titles standing upon inveterate usage and practice must be supported to the extent of the usage, but not beyond it.—*Crawford v. Coultts* - - - - - 684

DEATH-BED. *Vide* DEED. POWER. REVOCATION.

Lands, &c. being limited to heirs of entail by simple destination, a deed was executed in *liege poustie* in favour of the heirs general of the disponent after his death without issue, with a power to revoke or alter that disposition on

death-bed; and a declaration, that so far as it shall main unrevoked, and not altered by a writing under the hand of the disponent, it shall have the effect of a delivered evident, though, &c. By another deed, executed thirteen years after the first, all the lands, &c. together with the personal estate of the disponent, are vested in trustees in trust, to be sold, and the produce to be applied in payment of debts owing at his death, and legacies, &c. granted or to be granted, &c. (The objects of trust being different from those provided in the former deed) and the trustees are directed to convey, &c. the residue of the whole fund in favour of such persons, &c. as the disponent had directed or should direct by any writing executed, or to be executed, &c. On death-bed the disponent executes a deed of appointment, directing the trustees to convert the whole estate into money; and after giving certain legacies, he bequeaths the residue to his heirs, *M.* and *E.* for life, with remainder to other persons therein named; held, that this was not a revocation of the first deed, so as to give to the heirs of entail a title to challenge the last deed *ex capite lecti*; although the disponees for life, under the second deed, being the heirs general of the disponent, had reduced the death-bed deed on that ground, and thereby, under the doctrine of approbate and reprobate, had forfeited the life-interest given to them by the second deed.—*Roxburghe v. Wauchope* - - p. 619, 620

Where lands, by an instrument in the nature of a will, are disposed in trust to sell and pay certain legacies, and as to the residue for such persons as the disponent shall by writing appoint; and afterwards by deed made on death-bed he disposes of the residue, the law of death-bed applies to the case, and the disposition is reducible on that ground, so far as it relates to lands.—*Id.* - - 620

Lands, entailed by simple destination, being given by testamentary disposition to the sisters and heirs of the disponent, under obligation as to part of those lands, that they should be conveyed by his sisters to the heirs of tailzie, entitled by strict statutory entail to the principal mansion, &c. where the lands subject to the obligation

are situated, on condition that a certain sum shall be paid by a certain day by those heirs to the sisters. By a subsequent testamentary disposition, consisting of two deeds, the latter being made on death-bed, the lands of the disposer, including those in question, are vested in trustees upon trust, to sell and pay the interest of the produce to the sisters of the disposer for life, &c. who, as general heirs of the disposer, reduced the latter instrument, so far as it regarded lands destined heirs of line, as made on death-bed: held, that the heirs of entail have no title or interest to reduce the same instrument on the same ground as to the entailed lands, nor to call for a conveyance on payment of the sum specified in the condition: 1. because their interest is excluded by the *liege-poustie* deed, and is not restored, transferred to, or vested in them, because the disponees in that deed have forfeited or rejected their right under it: 2. because they must claim as disponees or legatees under that deed, and in such character they are barred from challenging the death-bed deed: 3. because in the events which had happened, they could not fulfil the conditions on which alone the benefit of the disposition could be claimed: 4. because they are not entitled to avail themselves of the right of redemption according to the condition, and under the obligation imposed on the disponees in the first deed, inasmuch as that obligation does not extend to the trustees who take under the death-bed deed.—*Id.* - - p. 621

A death-bed deed cannot be supported, unless it is founded upon some claim to the estate, available against the heir, created by, and continued available until, and at the death of the grantor, by a previous deed, to which the title under the death-bed deed may knit and attach itself, as a burthen by a death-bed deed attaches itself to an estate created by a *liege-poustie* deed.—*Crawfurd v. Coutts*, 675

If a valid *liege-poustie* deed exist at the death of the grantor, the death-bed deed will also be good. This *liege-poustie* deed must, however, be in favour of a stranger, and not in favour of the heir *alioqui successurus*. A deed in his favour would be held to be an evasion of the law, and not effectual. The stranger disponee is bound to hold good

was right; if it appears to be erroneous, the Court cannot carry it into execution.—(L. R.)—*Hamilton Houghton* - - - - - p. 103

DECREE PRO CONFESSO. *Vide* PRACTICE.

DEED. *Vide* DEATH BED. DEBT. DECREE. POWER. REGISTRY. REVOCATION. TRUST.

Where a deed of marriage settlement is drawn up as between the intended husband and wife and their respective fathers, and the father of the wife secures to the father of the husband a sum of money as the portion of the wife, according to a provision of the deed, but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father, it is binding upon and as between the parties who execute, and creates efficient rights for the objects of the settlement.—*McNeill v. Cahill* - - - - - 228

Though it be positively laid down, that a mere deed on death-bed shall not disappoint the heir, yet if a former deed has been granted in *liege poustie*, the grantor may, by a death-bed deed, burden the grantee of the former deed, so as to leave nothing valuable remaining of the title to the beneficial interest in the estate given to such former grantee; the former deed, however, remains in that case valid as a title-deed to the estate, however burdened by the latter deed.—*Crawford v. Coutts* - 669

DEED OF TRUST. *Vide* DEBT. INTEREST.

DEMURRER. *Vide* BILL OF EXCHANGE.

DEVISE. *Vide* CONSTRUCTION. POWER. REVOCATION. WORDS.

Devise to *W.* (a natural son of the testator's sister) for life, and after his decease to the heirs of his body, in such shares and proportions as *W.* by deed, &c. shall appoint, and for want of such appointment, to the heirs of the body of *W.* share and share alike *as tenants in common*; and if but *one child*, the whole to such only child, and for want of *such* issue, to the heirs of the devisor: held, that an *estate-tail* vested in *W.* by this devise.—*Jesson v. Wright 2 Semb.* that under such power, an appointment to an only child, before others born, is effectual.—*Ibid.*

Whether a power, under which all children have an interest, can be destroyed by forfeiture.—*Quære—Ibid.*

Although the words "*heirs of the body*," in a legal construction, can apply to one person only, it may be contended, where a power is given to appoint to heirs of the body, that it means a class of persons. The ulterior limitation to one child, in default of appointment, may operate as a description of the person, and does not conclusively prove that no estate tail was intended to be given.—*Jesson v. Wright*. - - - - - p. 10

It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will must give way to a general intent; and courts are bound to give effect to the paramount intent.—*Id.* - - - - - 49-51

It does not follow that a testator does not intend that heirs of the body shall take, because they cannot take in the mode prescribed. —(L. R.)—*Id.* - - - - - 57

Whether, under such a power, a deed executed by the father and the eldest son, to make a tenant to the *præcipe* to suffer a recovery, would operate as an appointment? *Quære*.—(L. R.) - *Id.* - - - - - 16

A devise to "*J. F. &c. and to the issue of his body lawfully to be begotten, and to the heirs of such issue for ever, &c.* But if *J. F.* shall die without leaving any issue of his body lawfully begotten, then, &c. unto *W. B.* and to his heirs for ever." Held to be an estate tail in *J. F.*—*Franklin v. Lay*, (note) - - - - - 59

In a will devising land, which must be executed in the presence of three witnesses, a power to devise any part of it by a will executed in the presence of two witnesses cannot be reserved.—*Cranford v. Coutts*. - - - - - 680

Land may be devised by will to be charged with legacies, or to trustees, to pay such sums of money as the testator may direct; and such legacies may be granted, or directions given, in any writing executed before two witnesses, or without witnesses. Where the land is already vested, even the witnesses to the will may take as legatees to the whole value of the land, but not one particle of the land can be devised but by a will in the presence of three witnesses.—*Id.* - - - - - ib.

Although the whole value of the land may be given in

legacies, yet after giving legacies to a certain amount the surplus cannot be given away in this manner. The surplus is held to be land, and is not thus to be disposed of.—*Id.* - - - - - 679

DISPOSITION. *Vide* DEATH-BED. POWER.

DOE v. GOFF. *Vide* WORDS.

The case of *Doe v. Goff* held not to be law. (*Per* L. R.)

—*Jesson v. Wright* - - - - - p. 58

DOMICILE. *Vide* PRACTICE.

ENTAIL. *Vide* DEATH-BED.

A pursuer asserting in an action of declaratur a right as unlimited fiar of lands has power to execute, and is bound by a deed of entail restricting his estate to a life-rent.—

Hotchkis v. Dickson - - - - - 303

EQUITY. *Vide* COURT OF LAW. FRAUD. PLEADING. POWER.

PRACTICE. REGISTRY.

ERROR. *Vide* JUDGMENT. PRACTICE. TIME. DECREE.

ESTATE-TAIL. *Vide* CONSTRUCTION. DEVISE. WORDS.

EVIDENCE. *Vide* EXCISE.

Whether proof *prout de jure* of delivery of goods can be allowed, where, subsequent to the alleged delivery, written statements of account containing partial settlements have been delivered, containing no notice of the disputed articles?—*Quære*.—*Dunbar v. Harvey.* - - - 350

Semb. that in such a case, where the dealing was between a publican and a distiller, who kept the accounts, it requires strong evidence of delivery of the goods to rebut the presumption arising from the accounts delivered.—

Id. - - - - - 351

Whether the account-books of the distiller in such a case afford a *semi-plena probatio*, and lay a ground for the oath in supplement?—*Quære* - - - - - ib.

EXCHANGE. *Vide* BILL OF EXCHANGE.

EXCISE:

The certificate of the secretary of the Board of Excise, as to the accuracy and effect of accounts in the books of the Excise, ought not to be received in evidence.—

Dunbar v. Harvey - - - - - p. 351

Whether accounts of stock kept in the excise books are

evidence between third parties, as to the delivery of goods?—*Quære—Id.* - - - - - ib.

Copies of such accounts may be given in evidence, *semb.* on the ground that the originals are public books; but in such case the copies produced must be proved by a witness who had examined them with the originals, and can swear to their accuracy - - - - - ib.

EXECUTORS. *Vide* INTEREST. PLEADING.

FAMILY COMPACT. *Vide* AGREEMENT. FRAUD.

A transaction between parties dealing upon a doubtful question as to their rights, if it be not tainted with fraud, will be upheld, although one of the parties, being an advocate and brother of the other party, acted generally in the transaction as the legal adviser of his brother.—*Hotchkis v. Dickson* - - - - - 303

I. being seised of lands in Scotland, executes a deed, vesting the lands in trustees for sale to pay debts, and afterwards to manage the residue of the lands until, by accumulation of rents, they could purchase an equivalent in lands in the place of those which should be sold; and he directed that an annuity of 100*l.* for life should be paid to *D.* his brother and heir at law, and a like annuity to *W.* the son of *D.*; and when the purposes of the trust should be accomplished, the trustees were to divest themselves of the estate in favour of such person as at that time might be the eldest son of *D.* and his heir. *I.* had never completed his title to the lands, and after his death *D.* not being satisfied with the provisions of the trust, served himself heir to his father, passing by his brother *I.* and brought an action to reduce the deed of trust. A judicial sequestration of the estate was the consequence of this action, and other matters in litigation respecting the estate. In order to settle all disputes, the parties interested, including *D.* and *W.*, executed a deed, submitting all differences to the award of chosen arbitrators. The deed, among other things, empowered the arbitrators to determine “in what manner and to what series of heirs, and under what conditions, &c.” the lands should be settled. The arbitrators by their award di-

rected, that *D.* and *W.* should execute, as to the lands not sold, a tailzie and strict settlement in favour of *D.* in life-rent, and *W.* and the heirs male of his body in fee, whom failing, &c. with the clauses prohibitory, &c. contained in a scroll, &c. and particularly that the life-rent of *D.* should be charged with the payment of an annuity of 250*l.* to *W.*, which should be a real burden on the lands. *D.* and *W.* executed a deed of entail accordingly, but *D.* refusing to deliver it, another deed of similar import was drawn up, and executed by *W.* only, to whom the trustees executed a deed of renunciation, and disposed the lands; *D.* having previously by order of the arbiters conveyed to the trustees, upon his claim of right as heir, and to perfect their title. The entail contained the usual prohibitions against selling the estate. Upon failure of issue of *W.* the lands by this new entail were limited to *J. D.* next brother of *W.* The entail was executed in 1776. In 1785, *D.* being dead, and *W.* being in possession of the lands, and claiming a right, notwithstanding the entail, to sell for payment of debts, conveyed part of the lands to a trustee for that purpose; and the trustee having accordingly contracted with a purchaser, an action of declaratur was raised by *W.* and the purchaser against *J. D.* and the other heirs of entail, concluding to have it declared that the lands were liable to the trust for the payment of debts, and the decree of the Court was according to the conclusion of the summons. In the year 1808, *W.* being embarrassed and in debt, advertised all the lands, except one farm and a few parks, with the mansion, for sale. Whereupon *J. D.* remonstrated, and having threatened, on behalf of himself and the other heirs of entail, to prosecute a declaratur of irritancy, a compromise was effected on the terms, that a sufficient part of the lands should be sold to discharge the debts of *W.*, and that of the lands remaining unsold, a new entail should be made, restricting the estate of *W.* to a life-rent, and giving to *J. D.* and the heirs of the former entail, estates in tail general. In this transaction *W.* had no legal adviser but his

brother *J. D.* who was an advocate, and had usually acted as the legal adviser of *W.* The deed of entail was drawn up under the direction of and settled by *J. D.* It contained a recital of the former entail, a statement of former sales of parts of the lands by *W.*; that he had thereby become liable to a declaratur of contravention of irritancy at the suit of *J. D.*, but that he had agreed, for the accommodation of *W.*, not to object to the sales already made, nor prosecute his right of action, on condition that *W.* would execute the deed; and upon this recital *W.* thereby limited the lands unsold to himself in life-rent, and to *J. D.* and the heirs-male of his body, whom failing, to the heirs-female of his body, &c. This deed was accordingly executed by *W.*; but he becoming again embarrassed and involved in debt, at the instance of his creditors brought an action to reduce this deed of entail, on the ground of fraud, want of power, &c. The Court below held, that *W.* had power to execute the deed; that it was delivered and irrevocable; that there was no legal ground to set it aside; and that it did not appear from the tenor of the deed or collateral evidence, that *W.* was improperly or fraudulently induced to execute it. This judgment was affirmed on appeal.—*Hotchkis v. Dickson* - - - p. 304, 305

FEU. *Vide* SUPERIORITY.

FORFEITURE. *Vide* DEVISE.

FRAUD. *Vide* AGREEMENT. FAMILY COMPACT.

A transaction of sale, made upon a false or mistaken consideration, between parties in the relation of brothers in law; the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father; and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made: but if the consideration for the purchase was the balance of an account, which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts.—*McNeill v. Cahill*. - - - 228

Upon a bill by the vendor, seeking to rescind the sale on

the ground of fraud and oppression in the transaction, and error in the accounts, although the prayer to rescind the sale was refused, the account was opened after a considerable lapse of time.—*M'Neill v. Cahill*, p. 228, 229

An agreement between an insolvent debtor and his assignee, by which an estate of the insolvent is to be held in trust by the assignee, to pay out of the rents and profits annuities to the insolvent and his wife, and the surplus towards the extinction of a debt owing to the assignee, is a transaction which, being brought before a court of equity at the instance of the insolvent himself, must be rescinded on the ground of public policy. (L. R.)—*Id.* - - - - - 229

A contrivance to provide by a deed for the family of an insolvent debtor and the assignee as one of his creditors, at the expense of the other creditors, is a transaction which a court of equity cannot countenance or suffer.—*Id.* 260

It is a deed contriving a fraud against creditors, to which a trustee for them is a party.—*Id.* - - - - - ib.

HEIR. *Vide* DEATH-BED. REVOCATION.

The word *heir* is understood in Scotland in a different sense from what it is in England. In Scotland an heir may be the person pointed out by the destination of former settlements of an estate. In England the heir takes purely by descent; and the person taking by a destination is considered as a purchaser; as a person not taking in the quality of heir.—*Craufurd v. Coutts* - - - 667

In Scotland the maxim of *mortuus seisis vivum* does not obtain as in England: a proceeding in Scotland to take up *hereditus jacens* is rather against the estate than the person; the right can be made effectual directly upon the estate, if constituted by a deed containing procuratory and precept by an adjudication in implement.—*Id.* 686

HOMOLOGATION. *Vide* TAILZIE.

HUSBAND AND WIFE. *Vide* DZED.

ILLEGITIMACY:

By the law of England, a trust for illegitimate children to be begotten, cannot be supported.—*Hamilton v. Waring* - - - - - p. 209

IMPLICATION. *Vide* DEBT. LEASE. WORDS.

INSOLVENT DEBTOR. *Vide* FRAUD.

INTENTION. *Vide* APPOINTMENT. CHARGE. CONSTRUCTION. DEVISE.

In a deed of settlement, creating a jointure, the question must be decided by the intention expressed in the deed. The meaning is to be collected from the words immediately applicable to the point, from the context, and from all parts of the settlement.—*Lansdowne v. Lansdowne* 88

In those instances where Irish estates only are charged, the situation and conduct of the parties, and the language of the instrument of contract, may show that they meant English currency.—*Id.* - - - - - 93

INTEREST. *Vide* DEBT. PRACTICE. RES JUDICATA. TRUST.

K. having left East-India bonds in the hands of a mercantile firm at Calcutta, with directions to apply the interest and principal, when received, to a specific purpose, by his will appointed *G.* a partner in the firm, one of his executors. After the death of *K.* the will was proved by *G.*, and the firm, acting under his authority as executor, assigned the bonds, and used in their trade the money received upon the assignments. *G.* ceased to be a partner in the firm before all the bonds had been assigned. Upon suit, by the residuary legatee of *K.* against *G.*, and on appeal, it was held that he was accountable to the residuary legatee of *K.* for the monies received upon the bonds, with 8 per cent from the time of the deposit to the dates of the respective assignments by the firm; and with interest at 12 per cent (being the current rate at Calcutta) from the time of the assignments and receipt of the money to the date of the judgment upon appeal in the original suit; and with interest at 5 per cent upon the accumulated sum, composed of principal and interest, from the last-mentioned judgment till payment; but the cost of remittance from India, and the property-tax, were held to be charges on the fund payable.

—*Graham v. Keble* - - - - - p. 126

If *A.* intrusts *B.* to lay out money for him in government bonds; and if, instead of doing so, *B.* lays it out for him-

self, or for his own partnership, he is liable to pay to *A.* the common rate of interest.—*Graham v. Keble* - - p. 146

Upon a general account subsisting between *K.* and the Calcutta firm, held that *G.* as partner and executor was liable for the balances of account, and interest at 12 per cent upon all such balances as should appear to be stated and signed by the parties; such interest to be calculated from the date of the statement and signature of the account to the time of the final judgment on appeal. Held also, that *G.* was not, as executor, entitled to withhold payment against the residuary legatee until an account of debts, &c. had been taken; and that, as debtor, he was not entitled to require that executors in England (who had also proved the will of *K.*) should be parties to the suit, in order to give him an acquittance.—*Id.* - - - - - 126

In appellate proceedings, interest upon the accumulated sum of principal and interest is chargeable on the debtor from the date of a judgment in the Court of Session to the date of the judgment in the Court of Appeal, although the Respondent has obtained an inhibition against the lands of the Appellant before the date of the original judgment.—*Id.* - - - - - 127

A debt by simple contract does not carry interest, because provision for its discharge is made by a deed of trust; such a deed *per se* does not import contract or trust for the payment of interest, especially where the creditors have not signed the deed, and no agreement is made to charge the land and discharge the person.—*Hamilton v. Houghton* - - - - - 170

The mere direction by deed to pay debts does not infer either contract or trust to pay interest upon debts by simple contract.—*Id.* - - - - - 186

ISSUE. *Vide* COSTS.

JOINTURE. *Vide* INTENTION.

JURISDICTION. *Vide* COURTS OF JUSTICE.

JUS CREDITI. *See* SETTLEMENT.

LACHES. *See* PARTNERSHIP. PRACTICE.

LANDLORD AND TENANT. *Vide* LEASE.

LAPSE OF TIME. *Vide* DECREE. PARTNERSHIP.

LEASE. *Vide* CONTRACT TAILZIE.

A tenant, by a clause in his lease, was bound "at his removal, to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, &c. and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground."—*Roxburghe v. Robertson* - - p. 156

Held on appeal, (reversing the judgment below), that the tenant under this contract is not entitled to take away or sell, (or *semb.* to have value for) the straw of the last or way-going crop; and that the lessor is entitled to have and maintain letters of suspension and interdict, if the tenant threatens to sell the straw. - - *ib.*

A provision in a lease, that the dung and manure of the last year is to be left upon the ground, and paid for according to a valuation, and the absence of any such provision, as to the hay and straw, does not show that the tenant was to be at liberty to carry and take away, at the expiration of the lease, the hay and straw of the last year, the prohibition extending, not only to selling or giving away, but providing that the hay and straw shall be always spent on the ground, is to be considered as applicable, not only to the currency of the lease, but to an act which takes place at or after its termination.—*Id.* - - - 165

A tenant, occupying a farm by lease under an express contract, having no hay or straw which was taken away by the precedent tenant, receives a consideration for those articles in the amount of the rent to be paid by him.—*Id.*

The law presumes a consideration for this sacrifice, on the part of the tenant, in the nature and conditions of the contract. He binds himself by express obligation; and it must be inferred and implied, that in his contract he stipulated for some equivalent benefit.—*Id.* - - - 166

From the provision, that the dung and manure are to be left on the ground, and paid for, an inference is not to be drawn that what, according to the expressions of the contract, the tenant is not bound to leave, he may carry away, nothing being said as to any payment for hay and straw, and the clause which provides what shall be done at the removal, that is, the expiration of the lease, stipulating

that the hay and straw of the farm "shall always be spent on the ground." If the expression had been, that the tenant should spend it, that might lead to a different construction.—*Roxburghe v. Robertson* - - p. 166

The provision that the tenant shall at no time sell or give away the hay or straw, is absolutely incompatible with the supposition of a right in the tenant, in any manner, to eloin those articles during the last year. *Semb.* that the express words of the instrument prevent all conjectures as to any intention to except the last year of the lease.—

Id. - - - - - p. 166, 167

LEGACIES. *Vide* CURRENCY. DEVISE.

A legacy in the words contained in a power, *i. e.* given to be paid "in lawful money of Great Britain," is payable in the currency of England.—*Lansdowne v. Lansdowne* p. 91

Unascertained or general legacies must be paid in the currency of the country where the will is made. The rule of law in the case of a legacy, where a party must claim under the voluntary benefaction of the testator, will *à fortiori* apply to a case where the party is a purchaser.—*Id.* - - - - - 92

LEX LOCI CONTRACTUS. *Vide* POWER.

LIEGE-POUSTIE. *Vide* DEATH-BED, DEED.

LIFE-RENT. *Vide* ENTAIL.

LIMITATION. *Vide* DEVISE.

MARRIAGE SETTLEMENT. *Vide* DEED. SETTLEMENT.

MONEY. *Vide* APPOINTMENT. RENT-CHARGE.

There is no lawful money of Ireland, it is merely conventional; there is neither gold nor silver coin of legal currency, nothing but copper; there is no such thing as Irish money, it is Irish currency. (L. R.)—*Lansdowne v. Lansdowne* - - - - - 79

PARTIES. *Vide* DECREE. DEED. INTEREST. PRACTICE.

TRUST.

PARTNERS. *Vide* INTEREST. PARTNERSHIP.

Transactions between partners may amount to a waiver of a written agreement, or evidence of a new agreement different from written articles, provided those transactions show a probability, amounting almost to demonstration,

that the articles were otherwise intended.—*Geddes v. Wallace* - - - - - p. 271

PARTNERSHIP:

The manager of a partnership concern, having a salary with a share of the profits according to a proportion of capital and stock, not advanced by him, but assigned by way of nominal interest, (for the purpose of creating an addition to his salary, depending upon the contingency of the success which might be consequent upon his skill and industry,) is not a partner subject to loss in account with the other partners.—*Geddes v. Wallace* - - - 270

In such a case the manager is not liable for loss, although it is expressed in the articles of partnership, that the partners (not excepting the manager) are to be "subject to profit and loss;" and although the manager signed the partnership books, joined in securities given by the partnership, and in most other partnership acts, including the advertisement for a dissolution, because it appeared from the general structure, and all the provisions of the contract taken and construed together, as well as from the transactions between the parties, and the conduct of the other partners, that the provision, as to profit and loss, was not intended to apply to the manager.—*Ibid.*

If it were so intended originally, it could not be enforced at the date the suit commenced, because the other partners, upon the dissolution of the partnership, and for many years afterwards, made no mention of the subject; and particularly, as in a former suit between them and their manager, respecting the amount of his salary, they omitted to make any claim against him as partner for a share of loss; and more especially, as the Court below, and the House of Lords on appeal in that suit, estimated the salary on the supposition, that the manager was entitled to a share of profit as an addition to his salary, without being subject to loss; no mention or claim having been made on that subject, either in the original suit in the Court below, or upon appeal.—*Ibid.*

A partner may be liable for loss, as to the creditors of the partnership, and not so as to his co-partners.—*Ibid.*

The most positive expressions, as to liability to loss in the articles of a partnership, may be controlled and superseded by transactions between the parties, the conduct of the co-partners, and the special circumstances of the case, including non-claim and inconsistent representation during a protracted litigation, which furnished occasion to make the claim, if the right existed—*Id.* - - p. 271.

PLEA. *Vide* AFFIDAVIT. PLEADING.

PLEADING. *Vide* BILL OF EXCHANGE. DECREE. INTEREST. PARTNERSHIP. PRACTICE. RES JUDICATA.

A bill being filed against two parties, praying accounts and relief against both; after one of the defendants had put in an answer, an agreement is made between the plaintiff and the two defendants by their agent, who is also interested as a party to the agreement, containing various provisions as to the transactions of mortgage and partnership in mines, which were the subject of the bill, besides other matters of agreement; and providing that "all proceedings in law and equity shall cease between the plaintiff and the two defendants." This agreement, that all proceedings, &c. shall cease, &c. cannot be pleaded in bar to the whole suit by the defendant who has not answered.—*Wood v. Rowe* - - - 595

Such a plea may operate to displace the equitable relief sought by the bill, so far as it regards the party who pleads, but as a bar to the whole suit it cannot be pleaded.—*Id.* - - - - - ib.

Such a plea is, in effect, a plea of one part of the agreement in bar of the whole suit, which is inadmissible.—*Id.* - - - - - ib.

The object of a plea to a bill in equity is to reduce the subject matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject matter of the dispute, which is not effected by a plea of an agreement, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect.—*Id.* - - - - - 595

Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed.—*Id.* - - - - - ib.

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments that the conditions of the agreement have been performed, or from circumstances could not be performed; and that the other parties, not joining in the plea, are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But *semb.* that in such a case the court, not having the power to compel the performance of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement.—*Id.* - - - - - 596

It lies upon the party seeking the performance to take the steps necessary to enforce it, and not upon the other party bound by the agreement, being plaintiff in the original suit, to intercept the effect of the agreement by filing a supplemental bill.—*Id.* - - - - - *ib.*

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action.—*Id.* - *ib.*

Such an agreement is totally different from a release under seal, but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill, as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties, —*Id.* - - - - - *ib.*

Such a plea, containing no averments, that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it.—*Id.* - - - - - *ib.*

POWER. *Vide* **APPOINTMENT.** **COSTS.** **DEVISE.** **ENTAIL.**
SETTLEMENT.

A power for the benefit of children, *semb.* cannot be forfeited or destroyed.—(L. R.)—*Jesson v. Wright* 15

Power in a marriage settlement to grant to a wife any annual sum of money or yearly *rent-charge to be tax-free, and without any deduction, and to be issuing out of and chargeable upon lands in Ireland*, so that such *rent-charge* do not exceed in the whole the yearly sum of 3,000*l. of lawful money of Great Britain.* Held, that a *rent-charge* appointed under and in the words of this power is payable in Ireland, in the currency of England. But that the appointee is not entitled to have the sum transmitted to England free of the charge of conveyance and exchange, properly so called. The *lex loci contractus*, and the law applicable to cases of money charged as a rent payable out of land, where no provision as to the place of payment is made by the instrument, are inapplicable to a case where the instrument itself furnishes the means of interpretation.—*Lansdowne v. Lansdowne* - - - - 60

In the case of a simple charge of 3,000 *l.* on lands in *I.* the place of contract, the domicile of the parties, the place appointed for payment, and other circumstances, might require consideration; but in such a case as that above stated the instrument itself must give the rule of decision.—*Id.* - - - - - 78.

The power to charge Irish lands with so much lawful money of Great Britain is not such a power, that it is necessarily to be inferred that the money must be paid in England.—*Id.* - - - - - 94

The appointment directing it to be paid in Lincoln's-Inn Hall, the Court can only decide that the power is well executed, so far as it charges on the lands a sum of 3,000*l.* lawful money of Great Britain.—*Id.* - - - - *ib.*

By the appointment 3,000*l.* of lawful money of Great Britain is given according to the power; and such a provision, from the expressions and the whole frame of the contract, seems to have been contemplated by the parties.—*Id.* - - - - - 94

By a marriage settlement, containing the usual limitations, the husband having a life-estate in reversion, expectant upon the death of his father, was empowered when in possession, under the limitations of the settlement, to revoke, &c. as to so much and such part of the premises conveyed, "as shall be then in possession of any one or more tenants by virtue of any one or more lease or leases, whereon a rent or rents not exceeding 300*l.* by the year in the whole shall be reserved, &c. so as there shall not at the time of such revocation be less than 20 years or three lives unexpired of such lease or leases." The clause of the settlement conferring the power concluded with a declaration, that it was the true intent and meaning of the parties that the husband should at any time during his life, after he should come into and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner and to such uses and purposes as he should think proper. The husband (donee of the power) after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l.* or thereabout, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs and assigns; the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein upon trust, to sell the same, and out of the purchase-money to pay his debts, &c. The lands revoked, appointed and devised, except a very small part, to the value of 8*l.* a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will; but

in a suit instituted on behalf of creditors and legatees, to carry the trusts of the will into execution, it was found and reported by the officer of the Court, that the lands so appointed and devised were of the value of 300*l.* a year. By the decree in that suit the will was established, and the revocation and appointment held valid; and upon appeal to the House of Lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed.—*Lidwill v. Holland* - - - - 99

Where an estate can only be devised by a will executed in the presence of three witnesses, a person cannot reserve power to make a valid devise of his estate by will before fewer witnesses. A person cannot, by the medium of a will or deed, reserve to himself powers contrary to law.—*Craufurd v. Coutts* - - - - p. 689

In Scotland no man can make a valid *liege-poustie* deed in this form:—"Know all men by these presents, that I do hereby reserve a power to dispose of my estate at any time of my life, *et etiam in articulo mortis*." The *liege-poustie* deed must be some actual deed of disposition existing at the death of the grantor.—*Id.* - - - - ib.

PRACTICE. *Vide* APPEAL. ARMY AGENTS. COSTS. DECREE. EVIDENCE. FRAUD. INTEREST. LEASE PARTNERSHIP. PLEADING. RES JUDICATA. TRUST.

An action being brought against an executor by the residuary legatee, it is not (always) necessary to ascertain whether all the debts and legacies have been paid before the amount due to the residuary legatee can be determined.—*Graham v. Keble* - - - - 152

An executor has not a right to call on the residuary legatee for an account of all the estate and effects of the estator.—*Id.* - - - - ib.

If a case, arising out of the constitution of a deed of settlement, is sent from a court of equity to a court of law, the deed ought to form a part of the case, to enable a court of law to give a correct judgment.—*Lansdowne v. Lansdowne* - - - - 87

- Interest ought not to be computed from the date of the decree for payment, but from the day when payment is by the decree directed to be made.—*Hamilton v. Houghton* - - - - - p. 170
- An erroneous decree, directing payment of interest, cannot give the right to interest, but interest may be due under circumstances.—*Id.* - - - - - ib.
- A party who files a bill in a court of equity to have the benefit of a former decree, must show (if the case requires it) that such former decree was right. If a decree appears to be erroneous, it cannot be carried into execution.—*Id.* - - - - - ib.
- A decree taken *pro confesso*, is the decree of the plaintiff who takes it, and it is his duty to see that it is right. ib.
- A decree taken *pro confesso*, against one of the defendants in a suit, may be impeached for error by a party claiming under that defendant; and the party claiming under the plaintiff in the suit, can have no benefit of that decree, if erroneous.—*Id.* - - - - - ib.
- A decree taken *pro confesso* is conclusive against the defendant only as to facts within his knowledge, not as to facts which the plaintiff has the same opportunity of knowing as the defendant, *e. g.* as to the survivorship of a trustee, which was alleged in the bill, but proved to be contrary to fact.—*Id.* - - - - - ib.
- An appeal being against the decision of an issue, as well as against the decree on further directions, it is sufficient to reverse the decree on further directions. The reference by a court of equity to a court of law, is according to the course of a court of equity, and ought not to be impeached.—*Lansdowne v. Lansdowne* - p. 97
- If the plaintiff in a suit omits to put facts in issue by his original bill, or by amendment, leave to file a supplemental or amended bill, after the suit is at issue, ought not to be granted by the Court on the ground of inadvertence. A petition to obtain such leave ought to make out a case of new evidence lately discovered, material to the plaintiff's equity, and which, with reasonable diligence, could not have been discovered before; but, in such case, the

last registered is personally binding on the parties who execute; and the lands and property comprised in the deed first registered, are also bound, after satisfying the trusts of the first, by the contracts and trusts of the deed last registered.—*Id.* - - - - - p. 228

RELEASE. *Vide* PLEADING.

REMIT. *Vide* PRACTICE.

REMITTANCE. *Vide* INTEREST.

RENT-CHARGE. *Vide* CHARGE. CONSTRUCTION. INTENTION. POWER. PRACTICE.

In the simple case of a rent-charge upon lands in Ireland, it is payable in Ireland, and in Irish currency.—*Lansdowne v. Lansdowne* - - - - - 88

Where the words are, “to grant a rent-charge of 3,000 *l.* lawful money of Great Britain,” the court presumes an intent from domicile and other circumstances.—*Id.* - - - - - 92

The rules of law arising out of the effect of the *lex loci contractus*, or that the money is to be paid as a rent-charge issuing out of lands in cases where no provision is made by the deed or instrument of contract, are inapplicable to a case where the instrument itself furnishes the means of interpretation.—*Id.* - - - - - 77

RES JUDICATA :

Where a matter is by the pleadings specifically made the subject of demand, and the judgment is general for the demandant; yet if a particular part of the demand, as the rate of interest, was not discussed or specifically decided in the suit, it is not *res judicata*.—*Graham v. Keble* 127

RESIDUARY LEGATEE. *Vide* PLEADING.

REVIVOR. *Vide* PRACTICE.

REVOCATION. *Vide* DEATH BED. POWER.

If a person means to revoke an instrument with reference to a particular purpose, and that purpose is not effected, the original instrument is not revoked.—*Craufurd v. Coutts* - - - - - 684

If a party sits down, meaning to revoke a disposition of his property, and by the same act, *unico contextu*, to make a new one, if he makes the revocation, but dies before he

has completed his new disposition, he shall not be held to have revoked his former disposition, because his revoking it was but part of his purpose, and his act was incomplete. But if he completed his purpose by a new disposition, the first is revoked however inadequate such new disposition may be to convey his property.—*Craufurd v. Coutts.* - - - - - p. 684

If *A*, having made a will of land, afterwards makes another in which he revokes it, and gives his land to a monk, or an alien, the revocation is good, although the devise is void, because the purpose was complete so far as it was in his power to complete it.—*Id.* - - - - - 685

If the heir is let in *pro brevissimo intervallo*, the intention or power of the grantor to give away his estate upon death-bed signifies nothing, if it is not done *habili modo*. The cases of the destruction of the *liege-poustie* deed though cancelled only to execute another deed, or a revocation by indorsement, when a new deed was the next moment executed, show, that what may be done validly in one mode cannot be so in any mode.—*Id.* - - - - - 688

In the case of *Rowan and Alexander* a false principle was laid down on the Bench, that because the testator could effectually have given the value of his estate in money, therefore the disposition of the estate was valid. It was said in that case, that there was no express revocation, but *semb.* that giving the estate wholly to another, was equivalent to an express revocation.—*Id.* - - - - - 687

That case must now be held to stand upon this principle, that the testator did not mean the former deed to be revoked unless the second deed was found to be good, and expressing nothing as to a revocation of the former deed, must be held to have meant in effect that both should stand to accomplish the purpose he wanted, of giving the estate to the disponent in the last deed.—*Ibid.*

The case of *Rowan v. Alexander* has become authority from lapse of time—*Id.* - - - - - 680

SECEDERS. *Vide* CHURCH OF SCOTLAND.

SETTLEMENT. *Vide* INTENTION. PRACTICE.

Under a marriage contract in 1735, lands subject to the limitations of an entail, in 1708, are resigned by the hus-

band, being heir in ossession, and destined upon new infestment to the husband, and the heirs-male of the marriage, which failing, to the heirs-male of the body of the husband in any future marriage; which failing, to the *heirs-female* of the said spouses, and the heirs-male to be procreated of their bodies; the eldest daughter or heir-female, and the heirs-male descending of her, always excluding the rest, and succeeding without division. To fulfil the obligations of this contract, the husband made up titles, and was infest in 1736. A daughter was the only issue of the marriage. This daughter (being married) by contract, in which her husband joined, and which was carried into effect under a decree-arbitral in 1759, accepted a sum of money in full satisfaction of all right of succession which "they have, or in any event may have to the lands subject to the marriage contract, and of the provisions to children of the marriage in any portion, &c. whatever, which the daughter or her husband might claim on the decease of the father," and they accordingly quit claim, and discharge the father from all demands, and renounce and overgive to him, his heirs and assignees, "all right, claim of succession, or other right which the daughter and her husband have, or in any event may have, under the provisions of the marriage contract." In the same year, 1759, a disposition was executed by the father in favour of himself and the heirs-male of his body, whom failing, to his brother, &c. The daughter died in 1768, leaving a son, *J. R.* The father died in 1774. In 1806, *J. R.* was served heir to his mother, and brought an action to reduce the disposition of 1759, and all subsequent conveyances of the lands subject to the marriage contract of 1759. *J. R.* dying in 1811, the appellant. Mrs. Majendie, became pursuer in the action, as the sister of *J. R.* and heir of provision, under the destinations of the marriage contract; held, 1st, that she was heir-female within the meaning of the terms of the destination; 2d, that the entail of 1708 was barred, both by positive and negative prescription; 3d, that the daughter had power to contract with the father, and renounce and discharge the right under the marriage contract as a *jus*

crediti vested in her; the effect of which discharge is to bar the right of all other heirs of the marriage.—*Mujendie v. Carruthers* - - - - - p. 692, 693

SIMPLE CONTRACT. *Vide* INTEREST.

SPECIALTY. *Vide* DEBT.

SPECIFIC PERFORMANCE. *Vide* PLEADING.

STATUTE OF FRAUDS. *Vide* DEVISE.

“STERLING.” *Vide* CURRENCY.

SUPPLEMENTAL BILL. *Vide* PRACTICE.

SUPERIORITY:

When a vassal subfeus his possession for its full adequate value at the time, it is only a year's subfeu duty, and not a year's rent upon the value improved by buildings, which he is bound to pay to his superior as a composition for an entry to a singular successor. —*Heriot's Hospital v. Ross* - - - - - 707

TAILZIE:

Under a strict tailzie prohibiting alienation, but containing a power to grant leases, provided that they do not exceed twenty-one years, and be not let with evident diminution of the rental, the heir of tailzie in possession, acting upon the opinion of counsel, made leases to his steward at rents a little above the former rents of the lands leased, but far below their market value, with intent that the steward should underlet the lands at their full value, and pay the surplus, beyond the rents reserved in the principal leases, to persons named by the grantor of the leases, the heir of tailzie in possession. The steward accordingly underlet the lands at rents exceeding the principal rents by 1,371 *l.*; and some time after the grants of the principal leases, executed a trust obligation in favour of the objects of the trust. Held, that the leases from the time of the grants, until the declaration made by the trust obligations, were held in trust for the grantor, and that they were invalid as a violation of the prohibitions, and not within the power given by the deed of tailzie.—*Hamilton v. Waring* - - - - - 196

Whether receipt of the rent reserved upon the principal leases, or knowledge of and acquiescence for a considerable time in the payment to the objects, of the trusts of the surplus, arising from the rents reserved upon the under-leases, constitute homologation?—*Quære. Hamilton v. Waring* - - - - - p. 197

TENANT. *Vide* LANDLORD AND TENANT. CONTRACT.

TIME. *See* REVOCATION.

When titles have for many years been founded and rested upon the principle of a decision, it ought not to be disturbed though erroneous.

On this ground the case of *Rowan v. Alexander*, so far as it relates to the doctrine of implied revocation, must be supported. *Craufurd v. Coutts* - - - - - 687

TITLE. *Vide* CUSTOM. DEED.

TRADESMENS BOOKS. *Vide* EVIDENCE.

TRUST. *Vide* CHURCH OF SCOTLAND. DECREE. FRAUD. ILLEGITIMACY. INTEREST. REGISTRY. RENT.

Where estates are vested in trustees for the payment of debts, and subject to that charge are limited for life, with remainders over, the charge being introduced upon the estate by an agreement between the father and the son, (remainder-man in tail,) that the son should suffer a recovery, and charge these debts of his father upon the estate; the trustees hold the estate in trust for the creditors, and, subject to the claims and rights of the creditors, are trustees for the father for his life, and after his death for the several persons who are entitled in remainder under the deed. (L. R.)—*Hamilton v. Houghton* - 192

Where a trust is created by deed for the payment of debts, if a bill is filed by one of the creditors to enforce the payment of his debt, that purpose can only be effected by the general execution of the trust. The decree ought to direct such execution, and an inquiry as to all the debts owing and payable under the trust, and that they should be paid according to their priorities.—*Id* - 169

Upon a trust created for the payment of debts, whether interest is payable will depend upon the language of the deed. If there be debts with, and debts without interest,

and the words are general, it must be construed *reddendo singula singulis*. In decrees the language is guarded with that special view. The Master is directed to compute interest on such of the debts as bear interest.
—*Id.* - - - - - p. 181

On a question as to the right of a creditor to interest upon a debt payable under a trust, the nature of the deed must be observed, whether the debtor alone charges the estate, or being only tenant for life, the charge is made with the concurrence of the son, who is the owner of the inheritance, there being a clause in the deed to indemnify the son, which extends only to the principal of the debt.

In such a case, the representatives of the tenant for life should have been before the Court. He was bound to keep down the interest of the debts until the execution of the trusts. — *Id.* - - - - - 184, 185

TRUST OBLIGATION. *Vide* TAILZIE.

VENDOR AND VENDEE. *Vide* FRAUD.

WAIVER. *Vide* PARTNERS.

WAY-GOING CROP. *Vide* CONTRACT. LEASE.

WILL. *Vide* CHARGE. CONSTRUCTION. DEATH-BED. DEVISE. LEGACY. POWER. REVOCATION. WORDS.

WITNESSES. *Vide* DEVISE.

WORDS. *Vide* CONSTRUCTION. CURRENCY. SETTLEMENT.

The words "heirs of the body" mean, *primâ facie*, all descendants; and it is likewise a rule of law, that all descendants shall take under these words, unless they are clearly qualified and restricted by other words. The great difficulty arises in the application of these rules to the words of each will.—*Jesson v. Wright* - - - 49

In order to cut down an estate-tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent expressed. The words "heirs of the body" will indeed yield to a clear particular intent, that the estate should be only for life; and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal.—*Id.* - - - - - 53

All the cases but *Doe v. Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent contrary to the legal import of the former, are to be rejected.

That the general intent should overrule the particular, is not the most accurate expression of the principle of decision.—The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear the testator meant otherwise.—*Id.*

In many cases, if not in all, except *Doe v. Goff*, it has been held that the words “tenants in common” do not overrule the legal sense of words of settled meaning.—*Ibid.*

It is dangerous where words have a fixed legal effect to suffer them to be controlled without some clear expression or necessary implication. (L. R.)—*Ibid.*

WRITING. *Vide* CUSTOM.

END OF VOL. II.
